

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GOLDEN BETHUNE-HILL, an
individual, et al.
vs.
VIRGINIA STATE BOARD OF ELECTIONS,
et al.

:
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: Civil Action No.
: 3:14cv852
:
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: October 12, 2017
:
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COMPLETE TRANSCRIPT OF THE BENCH TRIAL

BEFORE: THE HONORABLE ROBERT E. PAYNE

THE HONORABLE BARBARA M. KEENAN

The HONORABLE ARENDA L. WRIGHT ALLEN

APPEARANCES:

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1 THE CLERK: Day four. Case No. 314-cv-852.

2 *Golden Bethune-Hill, et al. v. The*
3 *Virginia State Board of Elections, et al. and the*
4 *Virginia House of Delegates, et al.*

5 The plaintiffs are represented by Kevin Hamilton,
6 Abha Khanna and Aria Branch.

7 The Virginia State Board of Elections is represented
8 by Trevor Cox.

9 The Virginia House of Delegates is represented by Amy
10 Tolbert, Mark Braden, Katherine McKnight and Richard
11 Raile.

12 Are counsel ready to proceed?

13 MS. MCKNIGHT: Yes, Your Honor.

14 MR. HAMILTON: We are, Your Honor.

15 JUDGE PAYNE: Good morning. I know you like
16 always to be on your toes and alert for changes so I'd
17 like to tell you about a change that we'd like to impose
18 on you all so you'll have some time during the morning
19 break to sort through it.

20 I think we would like to hear maybe about ten minutes
21 from each of you at the end of the presentation this
22 morning sort of summarizing what you -- your positions
23 are, what you think has been proved.

24 All right. Ms. McKnight, who is your next witness?

25 MS. MCKNIGHT: Yes. Thank you, Your Honor. One

1 brief administrative point. Yesterday you asked for a
2 list of identifying exhibits that defendant-intervenors
3 have proposed and served on plaintiffs and to which
4 plaintiffs have not objected. We have prepared that list.
5 We've shared it with plaintiffs. We understand they do
6 not object to the list. However, there are two exhibits
7 in there that have been edited by agreement of parties.
8 So plaintiffs need the opportunity to confirm that the
9 versions of the exhibits you have are in compliance with
10 the agreement. So --

11 JUDGE PAYNE: Your fine legal assistants will do
12 that during one of the recesses, and they can come right
13 up here and check it out.

14 MR. HAMILTON: So long as we have permission to
15 approach the bench, yes, Your Honor.

16 JUDGE PAYNE: There's nothing secret up here,
17 and if you can read any of our notes, you're really good.

18 MS. MCKNIGHT: And now, Your Honor, this list
19 has not been prepared for filing. It's simply to help the
20 court reporter or the court clerk transcribe the exhibits.

21 JUDGE PAYNE: All right.

22 MS. MCKNIGHT: Should I offer that now, Your
23 Honor?

24 JUDGE PAYNE: Just hand it on up. Thank you,
25 Mr. Roberts.

Stolle - Direct

1 MS. MCKNIGHT: Thank you, sir.

2 Your Honors, I'll like to call Delegate Stolle to the
3 stand.

4 **CHRISTOPHER P. STOLLE,**

5 called at the instance of the defendant-intervenors,

6 having been first duly sworn, testified as follows:

7 **DIRECT EXAMINATION**

8 BY MS. MCKNIGHT:

9 Q Good morning, Dr. Stolle.

10 A Good morning.

11 Q Could you start by telling the Court which House
12 district you represent?

13 A I represent the 83rd House District.

14 Q And for how long?

15 A Just about eight years now.

16 Q And aside from your role as a delegate, what is your
17 profession?

18 A I am a physician.

19 Q And is your office in your district?

20 A Yes, it is.

21 Q Now, your district, before the 2011 redrawing,
22 bordered House Districts 89 and 90; is that right?

23 A Correct.

24 Q Now, as a preliminary question, did you have any role
25 in the 2011 redrawing process?

Stolle - Direct

1 A I was -- I was asked where I live, and I think that's
2 about the only question I was asked in that process.

3 Q And now, what was happening in the south side/south
4 Hampton area, population wise, when the map was redrawn in
5 2001?

6 A When the map was redrawn, Hampton Roads actually lost
7 population in proportion to the rest of the state. So
8 there was a district that was moved I believe to Northern
9 Virginia.

10 Q Now, I'd ask the Court and, you, Dr. Stolle, to turn
11 to page -- in Map Book No. 1, turn to
12 Defendant-Intervenors' Exhibit 96 and 97, page 3.

13 JUDGE PAYNE: Do you have it?

14 THE WITNESS: Yes, sir, I do.

15 Q Now, on Defendant-Intervenors' Exhibit 96, page 3,
16 does this look to you to represent your House district and
17 its area prior to the 2011 redrawing?

18 A Yes, it does.

19 Q And on Defendant-Intervenors' Exhibit 97, page 3,
20 does this appear to represent your district and the
21 surrounding area after the 2011 redrawing?

22 A Yes, it does.

23 Q Now, for the Court to orient itself, would you mind
24 looking on computer screen and using your finger, press a
25 dot -- put a dot where your district was before redrawing

Stolle - Direct

1 in 2011, and then in the other map, could you put a map on
2 where your district was after?

3 Thank you. Now, while we're here, could you identify
4 for the Court with another dot in old map which district
5 was collapsed and moved out of this area?

6 And now, comparing the two maps, looking at your
7 district how it compares, how did your district change in
8 the 2011 redrawing?

9 A My district went primarily from a north/south
10 orientation to a east/west orientation. I picked up a lot
11 of communities along the Chesapeake Bay.

12 Q Okay. And do you think that the populations in the
13 Norfolk area explains some of this change?

14 A I think that the 87 moving -- being moved out of that
15 area certainly caused my district to move over in that
16 direction.

17 Q And in your new district as drawn in 2011, does it
18 make sense to you from the perspective of a community of
19 interest?

20 A It does. The -- I have a lot more along the
21 Chesapeake Bay right now. The communities have very
22 similar issues, particularly with coastal flooding,
23 erosion. And so I think that from a community of interest
24 perspective, my district, right now, is better than it was
25 before.

Stolle - Direct

1 Q And now, you campaigned for office in both 2007 and
2 2009, right?

3 A Correct.

4 Q And did you sense any shift in the political climate
5 between 2007 and 2009?

6 A Absolutely. When I knocked on doors in 2007, it was
7 towards the end of President Bush's term. Knocked on the
8 doors, folks would say, I'm never voting for other
9 republican. Two years later, change of administration,
10 I'd knock on the same doors and they'd say, I'm never
11 voting for another democrat. So I think the political
12 winds had more to do with it than individual candidates.

13 Q Okay. And did you win election in 2007?

14 A No. I lost.

15 Q And you won election in 2009; is that right?

16 A Correct.

17 Q Okay. And when you campaigned, what election
18 information was more useful to you, election information
19 from an odd year race or information from an even year
20 presidential race?

21 MS. BRANCH: Objection, Your Honor.

22 JUDGE PAYNE: And it is?

23 MS. BRANCH: Eliciting improper expert
24 testimony. She's asking him to testify about, you know,
25 which election he thinks is most important, and I -- it's

Stolle - Cross

1 to impeach experts who have already testified, it sounds
2 like.

3 JUDGE PAYNE: So the objection is what?

4 MS. BRANCH: Eliciting --

5 JUDGE PAYNE: It's expert testimony?

6 MS. BRANCH: Yes.

7 JUDGE PAYNE: Overruled.

8 Q Would you like me to repeat the question?

9 A Please.

10 Q When you campaigned, what election information was
11 more useful to you, election information from an odd year
12 race or information from an even year presidential race?

13 A We -- we only use the odd year races. We don't look
14 at the even year races. The turnout between the two races
15 is so different that it's not really meaningful
16 information for us in the odd years.

17 MS. MCKNIGHT: Thank you very much, Dr. Stolle.
18 I have no further questions.

19 JUDGE PAYNE: Cross-examination.

20 **CROSS-EXAMINATION**

21 BY MS. BRANCH:

22 Q Good morning, Delegate Stolle.

23 A Good morning.

24 Q You testified that you didn't have a role in the
25 redistricting process; is that correct?

Stolle - Cross

1 A That's correct.

2 Q You weren't a member of the Privileges and Elections
3 Committee?

4 A That's correct.

5 Q And you weren't a member of the redistricting
6 subcommittee, correct?

7 A That is correct.

8 Q You testified about some changes that were made to
9 your district as a result of redistricting, correct?

10 A Yes, I did.

11 Q But none of those requests -- none of those changes
12 were based on requests made by you to Delegate Jones; is
13 that correct?

14 A That is correct.

15 Q For instance, you didn't ever discuss with him any
16 relation between communities of interest and Virginia
17 Beach and Norfolk, correct?

18 A That's correct.

19 Q You never discussed with him costal communities, for
20 instance?

21 A That is correct.

22 Q And you also testified that the 87th House District
23 was moved from South Hampton Roads to Northern Virginia,
24 correct?

25 A I -- I know that it was moved from South Hampton

Stolle - Cross

1 Roads. I'm not entirely sure where it was moved to. I
2 think it was Northern Virginia.

3 Q Right. But you didn't know about that district
4 moving while the redistricting process was going on,
5 correct?

6 A That is correct.

7 Q You never discussed gaining any population from the
8 87th District with Delegate Jones; is that correct?

9 A That is correct.

10 Q At the time of the 2011 redistricting, you didn't
11 know which districts in South Hampton Roads were majority
12 black; is that correct?

13 A I did not know.

14 Q And you've never communicated with any members of the
15 Black Caucus who represent any of the districts that
16 surround your district about redistricting, correct?

17 A That is correct.

18 MS. BRANCH: No further questions. Thank you.

19 JUDGE PAYNE: Any redirect?

20 MS. MCKNIGHT: No, Your Honor.

21 JUDGE PAYNE: Thank you for being us and giving
22 us your testimony --

23 THE WITNESS: Thank you, sir.

24 JUDGE PAYNE: -- Dr. Stolle.

25 (Witness stood aside.)

Hofeller - Direct

1 JUDGE PAYNE: Your next witness.

2 MS. MCKNIGHT: Your Honor, defendant-intervenors
3 call Dr. Thomas Hofeller to the stand.

4 **THOMAS B. HOFELLER, PH.D.,**

5 called at the instance of the defendant-intervenors,

6 having been first duly sworn, testified as follows:

7 **DIRECT EXAMINATION**

8 BY MS. MCKNIGHT:

9 Q Good morning, Dr. Hofeller.

10 A Good morning.

11 MS. MCKNIGHT: I'd like to ask that
12 Defendant-Intervenors' Exhibit 14, the first page, is
13 shown on the screen.

14 A Yes.

15 Q And was this the report you submitted in this case in
16 2015?

17 A It was.

18 MS. MCKNIGHT: And I'd like to show the first
19 page of Defendant-Intervenors' Exhibit 102 on the screen.

20 Q And is this the report you submitted in 2017 in this
21 case?

22 A It is.

23 Q And you were admitted as an expert in this case in
24 2015, right?

25 A Yes.

Hofeller - Direct

1 Q Dr. Hofeller, could you take a moment -- and I
2 realize that this could be a very long answer, but could
3 you take a moment to give the Court a brief summary of
4 your experience in the field of redistricting?

5 A I'll try and keep it short here. I've actually been
6 in the redistricting field for just a little bit over 50
7 years. I actually started in 1965. I participated in the
8 redistricting process through five decennial censuses;
9 1970, 1980, 1990, 2000 and 2010. I've redistricted in
10 places all over the nation and am familiar with the
11 political geography pretty much in every state.

12 Q Thank you. And could you tell the Court what you
13 were retained to do in this case?

14 A I was retained to look at and examine Dr. Rodden's
15 report and comment on it.

16 Q Okay. And could you tell the Court what you were
17 retained to do in this case in 2015?

18 A I covered the areas of compactness and contiguity. I
19 might add one more thing, too. I did examine population
20 shifts.

21 JUDGE PAYNE: When?

22 THE WITNESS: In 2015, Your Honor.

23 Q And could you tell the Court briefly what kind of
24 experience you have in actually drawing redistricting
25 plans?

Hofeller - Direct

1 A I guess in my lifetime, I've probably drawn several
2 hundred redistricting plans in various states, both
3 congressional districts, legislative districts, county
4 districts, municipal districts and -- that's really it,
5 but many, many plans. And examined many plans.

6 Q And that is plans, not just single, stand-alone
7 districts; is that right?

8 A Well, actually, single districts would be included
9 in -- in every plan. But it's important always to examine
10 a plan as a whole, not just one district at a time.

11 Q How difficult is it to draw an entire plan?

12 A It's a very intricate task, particularly for the
13 lower house of a state legislature, because there's so
14 many districts and so many different competing interests
15 because of those districts. You have to examine the
16 population shifts. You have to examine the demographics.
17 You have to examine the political geography. You have to
18 keep track of the other factors such as compactness,
19 contiguity and -- well, that's a pretty good list, I
20 think.

21 Q What kinds of issues do map drawers normally face
22 when drawing or analyzing a map?

23 A Of course, as I stated somewhat before, drawing a map
24 is a little bit different than examining it because you're
25 actually creating a new map, and so you have to account

Hofeller - Direct

1 for all those factors which I mentioned before, plus the
2 other interests of the party that is actually having you
3 draw the map, be it the legislature or another political
4 body.

5 Q Now, I understand you reviewed Dr. Rodden's report in
6 this matter; is that right?

7 A Yes.

8 Q Okay. And are you familiar with the types of maps
9 Dr. Rodden put in his report?

10 A Yes.

11 Q And could you --

12 A I've seen those types of maps for decades, actually.
13 It's nothing new, as he stated, too, going back clear to
14 the plague, or something like that.

15 Q And have you ever produced a map of the type that
16 Dr. Rodden used in his report?

17 A Only for my own use. I find the maps to be
18 interesting, but they don't have enough detail on them for
19 me to actually either draw plans or to fully examine a
20 plan.

21 Q I'd like to put up an example of one of his maps,
22 Dr. Hofeller, if you can give me one moment.

23 So this is Plaintiffs' Exhibit 69, page 18. Do you
24 recall seeing this map in Dr. Rodden's report?

25 A I do.

Hofeller - Direct

1 Q And would you use this type of map to draw or analyze
2 a redistricting plan?

3 A No.

4 Q And why not?

5 A Again, because there's not enough specificity of
6 data. In order to know what the populations are and
7 exactly where it is, you have to start counting dots, and
8 that would be a process that would take many, many hours.

9 So for redistricting purposes, we would actually use
10 a color thematic for one factor. And usually in the
11 center of the unit of geography, be it a county or a
12 voting district or a census block, we'd have data
13 displayed in the center of that block. It could be
14 several pieces of data, but one of them for sure would be
15 the population -- the total population in the block.

16 Q Okay. And this map does not show you census block
17 boundaries; is that right?

18 A Not this map, no.

19 Q Okay. And would you need census block boundaries to
20 divide VTDs?

21 A Of course. Because blocks in a VTD are varying
22 greatly both in population and in size and in the actual
23 shape of the block. So you run into issues where one
24 block may block your progress across the map or be too
25 big. So you have to be very careful, when you're

Hofeller - Direct

1 splitting blocks, to actually find a place where it's both
2 logical and where you're able to select blocks that will
3 suit the purpose of dividing that unit up.

4 Q Based on your experience in redistricting,
5 Dr. Hofeller, can you draw an ideal district for any
6 delegate?

7 A Anybody could draw a district that the delegate would
8 like, particularly the delegate. One of the problems you
9 find in redistricting is that each incumbent thinks the
10 plan should start from their district and emanate outward
11 throughout the whole state. So they have an idea of what
12 they want, but the problem with it is that it has to fit
13 into a whole map which best satisfies all of the criteria
14 for the whole plan. So you can't -- can neither draw such
15 a map district by district in isolation from what's going
16 on in the map or do a -- a robust analysis of that plan
17 after the fact.

18 Q And drawing and passing a map is a legislative and
19 political process; isn't that right?

20 A Well, it's usually a legislative process. In some
21 states it isn't a legislative process. It's done by a
22 commission, in some cases by a court or a court master.

23 Q I see. And in reviewing Dr. Rodden's report for the
24 types of issues that you've described this morning, did he
25 take into account any of these various pressures on map

Hofeller - Direct

1 drawers?

2 A Not -- not as I read his report, no. He's merely
3 interested in looking at each district one at a time, but
4 he's not really bringing to bear all the pressures;
5 particularly in this case, pressures which involve
6 population shifts within the state, pressures which
7 involve adherence to the Voting Rights Act, pressures
8 which come from trying to maintain district cores, and
9 other factors that come into play.

10 Q And are there any timing pressures related to the
11 Voting Rights Act that were at play in this map in 2011?

12 A In Virginia, there was an extremely tight time frame
13 for Virginia. Virginia, along with Texas, actually gets
14 their census data first as it's released from about
15 March 1st after the decennial census, so in the odd
16 number -- the first year, which would be '01 or '91 or
17 '81. And they have to draw these districts very quickly.

18 And then because Virginia was a Section 5 state, in
19 the last time around, they have to prepare a fairly
20 comprehensive submission to the Justice Department to get
21 the map cleared or file a case in the D.C. District Court.
22 So they are on a very short fuse.

23 MS. MCKNIGHT: Can we put up Plaintiffs' Exhibit
24 69, pages 36 and 37?

25 Q To illustrate one of the points you were just making,

Hofeller - Direct

1 Dr. Hofeller, I'd like to draw your attention to the last
2 sentence on page 36 starting with, "The application of
3 traditional redistricting principles," going on to the
4 next page, "would have placed Colonial Heights, Virginia
5 State University and Petersburg in the same relatively
6 compact district and would not have segregated Hopewell."

7 Do you see that, Dr. Hofeller?

8 A Yes.

9 Q And in your review of Dr. Rodden's report, did you
10 see him take into account the various and numerous
11 pressures on map drawers related to traditional
12 redistricting principles?

13 A No, I didn't. This may be his idea of what he thinks
14 should go together, but it really has to be examined in
15 the light of the whole plan.

16 Q And now, just to put this in context, did you account
17 for all of these pressures in your own analysis in this
18 case?

19 A Are you talking about this phase of the trial?

20 Q In both phases.

21 A I certainly took them into account in looking at the
22 districts as they fit into the plan. Probably the -- the
23 main pressure was the population shifts -- the relative
24 population shifts across Virginia which necessitated the
25 collapse of three districts and their resurrection in

Hofeller - Direct

1 Northern Virginia. There's a reason why districts are
2 collapsed, and that's because if you don't collapse them,
3 you have to elongate districts and stretch them way out,
4 sort of like pulling taffy, and if you stretch them out
5 too far, like taffy, it will break.

6 So in order to create the least disruption on most of
7 the districts, sometimes it's necessary to move districts.
8 This causes a lot of turbulence in the boundary lines in
9 both places where you add the districts and where you
10 subtract the districts.

11 Q Dr. Hofeller, I'd like to ask you briefly about
12 compactness issues in Virginia. First, have you ever
13 lived in Virginia?

14 A Yes.

15 Q And during the time that you were living in Virginia,
16 had you drawn redistricting plans?

17 A Yes.

18 Q Is it safe to say that you've become well-acquainted
19 with Virginia geography and jurisdictions during that
20 time?

21 A Yes. Maybe not as much as John Morgan has, but I
22 lived in Virginia from 1981 to 1995 and then again from
23 1998 until 2014. So I have lived many, many years in
24 Virginia.

25 Q And how --

Hofeller - Direct

1 JUDGE PAYNE: The plans that you drew during the
2 time you were living in Virginia, were they plans in
3 Virginia?

4 THE WITNESS: I'm sorry. I didn't quite
5 understand the --

6 JUDGE PAYNE: She asked you while you were
7 living in Virginia, did you draw plans, and my question is
8 were those plans drawn for Virginia elections?

9 THE WITNESS: No. They were drawn actually to
10 support litigation and to examine for people who wanted me
11 to examine the nature of the plans and determine what was
12 going on in the map. If you've had all this experience,
13 you know, over the years, just looking at a plan that way,
14 you can make pretty good judgments about what was going
15 on.

16 Q And how does Virginia's geography present challenges
17 in computing compactness?

18 A Well, I wouldn't say it was actually computing
19 compactness, but certainly the shapes in Virginia cause
20 issues in compactness. There are a lot of river
21 boundaries. The state has an irregular boundary. You
22 also have trouble with compactness formulas on districts
23 which border adjoining states. Because the way
24 compactness is measured, it doesn't take into account
25 the -- the land outside of the state when it's computing

Hofeller - Direct

1 the factors. Also, the counties have relatively odd
2 shapes.

3 MS. MCKNIGHT: As a brief illustration, could we
4 put up Defendant-Intervenors' Exhibit 97, page 3?

5 Q Now, Dr. Hofeller, does this map of the Hampton
6 Roads/south side illustrate some of what you were just
7 describing about the geography affecting compactness?

8 A I think it has to be taken in context with the
9 Tidewater area, particularly the area south of the James
10 River estuary and, of course, the ocean and the border of
11 North Carolina, which means that all of the population
12 issues of all the districts in that area had to be
13 resolved at the eastern side of that territory.

14 MS. MCKNIGHT: You can take that down. Thanks,
15 Amy.

16 Q In your review of Dr. Rodden's report, did you see
17 where he conducted his own analysis of compactness issues?

18 A No. He opined on it, but I don't see any compactness
19 data usually measured by common compactness tests.

20 Q As one illustration of this, could we turn to
21 Plaintiffs' Exhibit 69, page 41? In the section of the
22 Tidewater region, Dr. Rodden states that district were
23 highly noncompact?

24 A Yes.

25 Q Is there any analysis in his report to back up that

Hofeller - Direct

1 assertion?

2 A Not that I saw. I think it's a -- it's a judgment on
3 his part, but I don't think it's backed up with actual
4 figures.

5 Q And would your answer be the same if I put up for you
6 every time Dr. Rodden opined on compactness?

7 A Pretty much so. I think he may have used what is
8 commonly called the eyeball test in making his judgments
9 on compactness.

10 JUDGE PAYNE: What page is this that's on the
11 screen?

12 MS. MCKNIGHT: Page 41.

13 JUDGE PAYNE: Thank you.

14 Q To tie this one off, you didn't see anywhere in
15 Dr. Rodden's report where he calculated compactness or
16 performed any kind of analysis regarding compactness; is
17 that --

18 A I don't --

19 Q -- right?

20 A I don't recall seen it. Excuse me.

21 MS. MCKNIGHT: Okay. You can take that down,
22 Amy. Thank you.

23 Q Now, we've heard testimony in this case that two
24 districts were moved from the south of Virginia to the
25 north of Virginia. Could you tell the Court how

Hofeller - Direct

1 population shifts in Virginia impacted map drawing in
2 2011?

3 A I believe it was three districts, actually.

4 Q And how would moving any districts to a different
5 part of the state affect map drawing in the part of the
6 state where the districts were removed?

7 A Well, where they're removed, of course, all the other
8 surrounding districts have to move in to fill the void
9 which is created by the district which has been moved.
10 And in terms of one of the main goals, which was to
11 preserve the cores of the existing districts, that has to
12 be done very carefully or some districts will be very
13 highly impacted in terms of their movement. So there are
14 all sorts of competing population flows going on in those
15 areas.

16 Q So why not just leave the districts there but move
17 them out to grab population as they needed?

18 A Well, as I stated before, it would make the districts
19 even less compact. And also, that type of a method
20 competes with the other factors, the other criteria, which
21 the legislature had set out to use.

22 Q And did you understand that the drawing of the plan
23 was impacted by the plus or minus 1 percent population
24 limit?

25 A Yes. That was an added complication on top of the

Hofeller - Direct

1 changes in relative population between the districts.

2 So at the beginning of the process, each decennial
3 census, the current populations, the new populations of
4 the districts, are calculated and the deviations from the
5 ideal population are calculated so that you know where the
6 districts are have too many or too few people.

7 But narrowing the allowable deviation from the ideal
8 district size by half also creates further complications
9 because if you had a higher deviation, you could actually
10 resolve some of those population flow issues easier. So
11 you might create some districts that are smaller and some
12 districts that are larger. So since this was such a tight
13 allowable population deviation, that added to the
14 complexity of creating the new districts.

15 Q And how would that tight deviation range affect the
16 number of VTDs that would be split in any district?

17 A In my judgment, it would probably cause more VTDs to
18 have to be split, particularly in those areas where the
19 districts had been removed or the districts had been added
20 where you're much closer to that problem. As it radiates
21 out into the other parts of the state, it isn't as big an
22 issue.

23 Q Now, I'd like to turn to Table 12 in your original
24 report.

25 MS. MCKNIGHT: This is Defendant-Intervenors'

Hofeller - Direct

1 Exhibit 14, and we're looking for Table 12.

2 Pardon me, Your Honor. This is on page 82 and 83 of
3 your original report. And 84, it would seem. But let's
4 keep these two pages on the screen for now.

5 Q Could you tell the Court what this shows?

6 A Yes. The first column, of course, is the district
7 number, going from 1 to 100. And the next column is
8 the -- what I call the core retention percentage, which is
9 the part of the new district which was made up from the
10 old district. So what portion of the old district showed
11 up in the new district in terms of the new district's
12 total population.

13 Those scores, of course, vary greatly. And you can
14 see where certain districts have been collapsed, there's
15 going to be a blank spot, which is actually a zero core
16 retention. And where the new districts are added, you'll
17 see a very low score also.

18 MS. MCKNIGHT: And could we put up pages 83 and
19 84?

20 JUDGE PAYNE: Excuse me. Where are these
21 reports?

22 MS. MCKNIGHT: Oh, pardon me. This is
23 Defendant-Intervenors' Exhibit 14.

24 JUDGE PAYNE: I know. I've got that. But where
25 are these?

Hofeller - Direct

1 MS. MCKNIGHT: These --

2 JUDGE PAYNE: You're using the 2015 report,
3 right?

4 MS. MCKNIGHT: Yes. That's right.

5 JUDGE PAYNE: In this notebook that you all gave
6 us?

7 MS. MCKNIGHT: Are you looking at the expert
8 witness notebook?

9 JUDGE PAYNE: Yeah. The expert witness
10 notebook. You've got Hofeller and then you've got a bunch
11 of attachments, Exhibit 1. Are we in one of the exhibits
12 or what?

13 MS. MCKNIGHT: It should be page 84, Bates
14 number page 84 in that document.

15 JUDGE PAYNE: Okay. So if we just keep going
16 with the numbers through the tabs, right? Page 80, what,
17 4?

18 MS. MCKNIGHT: Eighty-four.

19 JUDGE PAYNE: There. Thank you. Sorry.

20 A May I add something?

21 BY MS. MCKNIGHT:

22 Q Yes.

23 JUDGE PAYNE: Would you go back over that again
24 because I was fishing for the exhibit.

25 MS. MCKNIGHT: Sure. No problem.

Hofeller - Direct

1 THE WITNESS: Your Honor --

2 MR. HAMILTON: Well, I object to the witness
3 just adding something without a question. I have no
4 problem with --

5 JUDGE PAYNE: I asked her if she'd go back over
6 it again.

7 MR. HAMILTON: That's fine.

8 JUDGE PAYNE: I thought.

9 MR. HAMILTON: Yeah.

10 BY MS. MCKNIGHT:

11 Q So, Dr. Hofeller, looking at pages 82, 83 and 84 of
12 Defendant-Intervenors' Exhibit 14, this is Table 12 in
13 your original report, could you tell the Court what this
14 shows?

15 A Column 1, which is headed District, is the district
16 number. Column 2, which says Core Retention Percentage,
17 is, once again, the percentage of the new district that is
18 made from population that was in the old district. Column
19 3, which is African-American Majority, is really a flag
20 with a 1 in it that identifies that as a majority
21 district -- minority district. And the last column brings
22 that figure over from column 2 to column 4 so I could
23 actually calculate the difference in core retention
24 between the plan as a whole and the African-American
25 districts.

Hofeller - Direct

1 Q And now, when you talk about core retention, are you
2 talking about retaining people or land?

3 A People.

4 Q And now, you have a note on page 84 of your report.
5 What does this note offer the Court?

6 A This was a result of my analysis of the table, and I
7 said that three districts should be considered to have
8 been collapsed, which were 2, 10 and 87, which, of course,
9 had zero retention, and that the core -- average core
10 retention across the 10 districts was 67.9 percent. For
11 the 97 districts which were not collapsed, the average
12 retention rate was 69.09 percent. And for the 12
13 African-American majority districts, the core retention
14 was 72.76 percent.

15 Q And so --

16 A So the African-American districts had a higher core
17 retention rate than the rest of the plan.

18 Q Now, did you hear testimony by Dr. Palmer earlier
19 this week that the best predictor of whether a VTD was
20 placed in a challenged district was whether or not it had
21 been in the benchmark version of that district?

22 A Yes.

23 MR. HAMILTON: Objection, Your Honor. Beyond
24 the scope of his expert report. This expert, by his own
25 testimony this morning, was hired -- retained to comment

Hofeller - Cross

1 on Dr. Rodden, not Dr. Palmer.

2 MS. MCKNIGHT: We'll drop it, Your Honor.

3 JUDGE PAYNE: There's --

4 MS. MCKNIGHT: There's no need.

5 JUDGE PAYNE: Just a minute. You don't need to
6 finish.

7 MS. MCKNIGHT: We'll drop.

8 JUDGE PAYNE: She's not going to pursue the
9 inquiry.

10 MR. HAMILTON: Thank you.

11 MS. MCKNIGHT: Thank you, Your Honor. No
12 further questions. Thank you, Dr. Hofeller.

13 THE WITNESS: You're welcome.

14 JUDGE PAYNE: What did you say, D. Hofeller?

15 THE WITNESS: You're welcome.

16 JUDGE PAYNE: Oh.

17 **CROSS-EXAMINATION**

18 BY MR. HAMILTON:

19 Q Good morning, Dr. Hofeller.

20 A Good morning.

21 Q Dr. Hofeller, you've never been employed as a faculty
22 member in any university or college, have you?

23 A That's true.

24 Q And you have not published a great deal of scholarly
25 articles or peer reviewed studies, correct?

Hofeller - Cross

1 A That's true.

2 Q You testified during the first trial about
3 Dr. Ansolabehere's racially polarized voting analysis. Do
4 you recall that?

5 MS. MCKNIGHT: Your Honor, I'd object as being
6 beyond the scope of direct.

7 JUDGE PAYNE: She didn't ask about that that I
8 noted, Mr. Hamilton. Time for you to drop now.

9 MR. HAMILTON: I will.

10 Q The -- you, in your experience in drawing maps, are
11 aware of the restrictions imposed by the Voting Rights
12 Act, correct? You testified about that a moment ago?

13 A I've dealt with them through many decades, yes.

14 Q You agree with me that Section 5 of the Voting Rights
15 Act does not require the maintenance of a rigid black
16 voting age population percentage in majority minority
17 districts, correct?

18 MS. MCKNIGHT: I'd object, Your Honor, again.
19 This is beyond the scope of direct. I asked him about
20 timing issues related to the Voting Rights Act. I did not
21 ask him about any particular requirements for BVAP levels.

22 MR. HAMILTON: I think it's fairly within the
23 scope, Your Honor. She brought it up.

24 JUDGE PAYNE: Bringing up a topic doesn't open
25 up the whole door, particularly if she restricts. I don't

Hofeller - Cross

1 think that she covered that.

2 BY MR. HAMILTON:

3 Q Dr. Hofeller, you've worked for a number of
4 republican organizations over the years, haven't you?

5 A Yes.

6 Q You were a consultant to the National Republican
7 Congressional Committee for the 1990 redistricting cycle?

8 A Yes.

9 Q And the redistricting director for the Republic
10 National Committee from 1999 to 2003?

11 A Yes.

12 Q And then -- I'm not to be difficult here with the
13 dates --

14 A No. I'm just trying to remember.

15 JUDGE PAYNE: If that's on his resume, do we
16 need to go through that?

17 MR. HAMILTON: I think we do, Your Honor, but
18 I'm moving on.

19 Q Since the time you've -- and then you've been a
20 redistricting consultant for the Republican National
21 Committee from 2009 to the present, correct?

22 A That's correct.

23 Q And since then, you've been a private consultant
24 working or various republican candidates and campaigns and
25 committees, correct?

Hofeller - Cross

1 A I think the way you worded your question, I haven't
2 actually worked in campaigns.

3 Q Okay.

4 A Maybe you want to ask that again.

5 Q Sure. You've been a private consultant working with
6 various republican candidates and committees?

7 A Again, I don't really think I've worked with
8 candidates.

9 Q Mostly just the committees?

10 A I've worked with organizations usually.

11 Q Okay.

12 A Either governmental or nongovernmental.

13 Q And mostly on the republican side?

14 A Yes.

15 Q In fact, exclusively on republican side?

16 A In that time period, yes.

17 Q You have a company called Geographic Strategies,
18 correct?

19 A I do.

20 Q And your partner in that is one of the lawyers here
21 in the courtroom, Dale Oldham; is that right?

22 A Correct.

23 Q You've invoiced Mr. --

24 MS. MCKNIGHT: Your Honor, I'd object. This is
25 going way beyond what plaintiffs' counsel would need to

Hofeller - Cross

1 address credibility or the weight of the evidence,
2 testimony that Dr. Hofeller is going to provide. It's not
3 clear where he's going. He's asked a number of question
4 after telling you that he only needed a few more to get to
5 his point.

6 MR. HAMILTON: The point, Your Honor.

7 JUDGE PAYNE: Of that's true, but the particular
8 question at issue I think is a question that he can ask
9 about. It has -- it's probative of bias.

10 Q In fact, your partner in that company is one of the
11 lawyers that's right here in the courtroom, Dale Oldham;
12 isn't that right?

13 A Yes.

14 Q You've invoiced Mr. Braden more than \$57,000 for your
15 work in connection with this case, Bethune-Hill; isn't
16 that right?

17 A I believe that's correct.

18 Q Okay. You mentioned on direct that you have been
19 involved in redistricting in a number of states over the
20 course of five decade, I think. Is that accurate?

21 A Yes.

22 Q And just in the 2010 cycle, you were involved either
23 in preparing for redistricting or redistricting itself or
24 after-the-fact litigation in Florida, Maryland, Virginia,
25 Mississippi, Arizona, Missouri, Nassau County, New York,

Hofeller - Cross

1 Texas and North Carolina. Is that accurate?

2 A I don't actually remember Florida, but I think the
3 rest of the list is accurate, yes.

4 Q Thank you. Your work on redistricting has been
5 described as describing wombs for his team and tombs for
6 the other guys?

7 MS. MCKNIGHT: Objection, Your Honor. I don't
8 see the relevance. It sounds like hearsay. I don't know
9 that this is even relevant to this case. I'm not sure
10 where plaintiffs' counsel to trying to go.

11 JUDGE PAYNE: I think he's trying to show where
12 he's heading, what his bent is, as I recall. Is this some
13 advertisement from his firm? Because if it is, you can
14 put it in. But if somebody's comment -- for instance, if
15 I wrote or the Richmond Times-Dispatch wrote, then you
16 can't get in. That's not relevant, inadmissible and it is
17 hearsay.

18 MR. HAMILTON: It would be if I --

19 JUDGE PAYNE: It can't even be considered on
20 direct it's so 403 ridden because it opens for a lot of
21 other information. Now, if he said it or it's on his
22 website, have at it. Otherwise, leave it be, if you
23 would, please.

24 MR. HAMILTON: I'm not offering any hearsay
25 article or magazine. I'm asking him if his work has been

Hofeller - Cross

1 described as wombs for his team --

2 JUDGE PAYNE: I think I understood what the
3 question was when the ruling was made. If you'll just go
4 to the next question, that would be good.

5 MS. MCKNIGHT: Your Honor, was the objection
6 sustained?

7 JUDGE PAYNE: I guess I used too many words.

8 MS. MCKNIGHT: No. Thank you. Just for the
9 record.

10 JUDGE PAYNE: Sustained.

11 Q What you've said in your presentations, "Beware of
12 nonpartisan or bipartisan or staff bearing gifts. They're
13 probably not your friends." That's what you've said in
14 your presentations, isn't it?

15 A I did in one presentation, yes.

16 Q Now, in your expert report, you've attached a couple
17 of maps from North Carolina's 12th Congressional District
18 from 1992 to 2001, correct?

19 JUDGE PAYNE: Which report, Mr. Hamilton?

20 MR. HAMILTON: I think it was
21 Defendant-Intervenors' Exhibit 14, maps 1 and 2.

22 JUDGE PAYNE: Thank you, sir.

23 A That's the 1992 redistricting -- actually, I didn't
24 play a part in that. I actually testified in the court
25 case which challenged it.

Hofeller - Cross

1 JUDGE PAYNE: I think the question was did you
2 attach that to your report, wasn't it, Mr. Hamilton?

3 MR. HAMILTON: That was, Your Honor.

4 THE WITNESS: Yes, Your Honor, I did. I'm
5 sorry.

6 JUDGE PAYNE: All right.

7 Q And you attached two maps. One was from 1992, and
8 the other was from 2001; is that right?

9 A Yes.

10 Q What you didn't include was a copy of North
11 Carolina's 12th Congressional District from 2011, right?

12 A That's true.

13 Q And you're familiar with that district because you
14 actually helped to draw it in 2011; isn't that right?

15 A The plan, you mean?

16 Q That particular district.

17 A Oh, I'm sorry. I don't know which district you're
18 identifying.

19 Q The 12th Congressional District of North Carolina.

20 A Yes.

21 Q Okay. You worked really closely with Delegates Rucho
22 and Lewis in designing the congressional plans in North
23 Carolina that year?

24 MS. MCKNIGHT: Objection, Your Honor. Again,
25 I'd ask what relevance this has to this case and the maps

Hofeller - Cross

1 that are included in his report. He's already testified
2 he didn't include the 2011 map in his report.

3 MR. HAMILTON: And, Your Honor, it's a
4 calculated omission, I think.

5 JUDGE PAYNE: Why don't you just ask him if it's
6 a calculated omission and if so -- or why he omitted it
7 maybe.

8 MR. HAMILTON: Well, it's cross-examination.
9 I'd prefer not to ask a "why" question. I think I know
10 what the answer is.

11 JUDGE PAYNE: Well, I understand that, but you
12 need to get to the point, I think, because in getting to
13 the point, you're getting off base I think is her
14 objection, and she's right.

15 Q You testified in court in the *Cooper v. Harris* case
16 in defense of Congressional District 12 in North Carolina
17 just last year, didn't you?

18 MS. MCKNIGHT: Again, Your Honor, that is
19 related to a 2011 map. The maps that have been attached
20 to Dr. Hofeller's reports do not include the 2011 map.

21 JUDGE PAYNE: Well, I understand that, but
22 that's a different question now. Overruled.

23 Did you testify in support of the 12th Congressional
24 District map that was used in *Cooper v. Harris* in 2011?

25 THE WITNESS: Yes.

Hofeller - Cross

1 Q And that was the map that you had drawn?

2 A Yes.

3 Q And the Court concluded that race had predominated in
4 that case; isn't that true?

5 A Yes.

6 Q Now, in Virginia you didn't actually draw the map; is
7 that right?

8 A That's true.

9 Q Okay. You mentioned compactness a moment ago in the
10 direct examination. Are you aware that the parties have
11 stipulated to the compactness scores of the districts in
12 this case? It's no longer at issue?

13 A No.

14 Q All right. Dr. Hofeller, the Commonwealth of
15 Virginia uses voting tabulation districts as a basic unit
16 of geography, correct?

17 A It's the basic unit of geography, yes. In most
18 states, actually.

19 Q And it's true that, relatively speaking, there are
20 very few VTDs that are split in a given state during the
21 course of redistricting, right?

22 A It varies from state to state.

23 Q One reason to split a VTD might be to equalize
24 population to satisfy the one person, one vote principle,
25 right?

Hofeller - Cross

1 A Yes.

2 Q Another reason to split a VTD might be because of an
3 incumbency?

4 A Yes.

5 Q Another reason might be to maintain the core of a
6 benchmark district?

7 A Yes.

8 Q And looking at split VTDs can be informative
9 depending on how you use them and how you analyze them;
10 isn't that true?

11 A Yes, depending on how you use them and analyze them,
12 yes, to a certain degree.

13 Q So let's talk for a minute about dot density maps
14 like those prepared by Dr. Rodden. I take it you've seen
15 those kinds of maps before?

16 A I've even produced them, yes.

17 Q Okay. And in your first supplemental report, that's
18 the 2017 report, you explain that one of the reasons
19 you've rejected these kinds of maps is because, quote, The
20 maps are difficult for many line drawers to understand and
21 to grasp the information required for actual line drawing,
22 closed quote. That's included in your report, right?

23 A It is.

24 Q Of course, you're not suggesting that this court
25 can't understand or grasp the information presented in

Hofeller - Cross

1 that -- in those maps, are you?

2 A Well, I think that's really their decision, not mine.

3 Q Okay. And putting aside your objections to dot
4 density maps as a category, if one were to create a dot
5 density map, there's nothing methodologically wrong with
6 the way that Dr. Rodden prepared those dot density maps in
7 his report, right?

8 A That's true.

9 Q Now, it's fair to say that it's your opinion that a
10 court would get a better level of comprehension using a
11 map that was shaded to show racial data rather than using
12 the dot density format. Is that fair?

13 A That would be my preference, certainly.

14 Q And, of course, a court evaluating a map, like those
15 before us, could use both a shaded map like the ones
16 provided by Dr. Palmer and a dot density map like the ones
17 provided by Dr. Rodden, right? It's not an either/or.
18 They could use both, right?

19 A I'm not sure that I remember what Dr. Palmer's maps
20 looked like.

21 Q And you'll agree with me that dot density maps
22 provide a court with some relevant information. We might
23 argue about how much, but there's some relevant
24 information there, right?

25 A It's descriptive of the geography in terms of the

Hofeller - Cross

1 factors that it has on it, yes.

2 Q And to be clear, we can look through your reports all
3 day long, and you haven't provided the Court with either
4 dot density maps or shaded population density maps,
5 correct?

6 A That's true.

7 Q Now, just a couple more questions. You'll agree that
8 the census information available to the legislature
9 included, among other things, population by census block?

10 A Yes.

11 Q And it also had race and ethnicity data again down to
12 the census block?

13 A Yes.

14 Q In Virginia, there's no political party registration,
15 true?

16 A True.

17 Q So political party registration is not available at
18 any level, VTD or block?

19 A Correct.

20 Q In Virginia, election results are reported by the
21 state election officials either at the state or local
22 level by voting tubulation district, correct?

23 A Yes.

24 Q And then a VTD is composed of smaller units we've
25 heard described in this trial as census blocks, right?

Hofeller - Cross

1 A Yes.

2 Q So let's imagine, hypothetically speaking, that you
3 have a VTD with 10 census blocks in it. We could know, if
4 we wanted to, how the VTD as a whole voted in any given
5 election, right?

6 A Certainly.

7 Q And that data is available at the VTD level?

8 A Yes.

9 Q What you can't do at the census block level is
10 determine any political differences between different
11 census blocks, putting aside rounding errors. The
12 political data is just going to treat them exactly the
13 same?

14 A From that political data that is given, yes.

15 Q In other words --

16 A There could be ways to do it, but --

17 Q In other words, it treats all the census blocks
18 exactly the same?

19 A Again --

20 JUDGE PAYNE: Excuse me. What's the "it" in
21 that sentence -- or question? Excuse me, Mr. Hamilton.
22 "It treats it the same." What is the "it"?

23 MR. HAMILTON: If we -- the political data. I'm
24 sorry. It's an inartfully phrased question. Let me ask
25 it again.

Hofeller - Cross

1 Q Political data is report at the VTD level. I think
2 we've already established that. All you can know at the
3 census block level is going -- the census block level is
4 going to treat -- other than rounding errors, it's going
5 to treat each census block exactly the same within that
6 VTD because that's the information that's reports; isn't
7 that true?

8 A Except for rounding errors, yes, it would be, as if
9 all the blocks were the same as the voting district as a
10 whole.

11 Q Okay. So we can't make distinctions in that
12 hypothetical 10 census block VTD. It's going to treat
13 number 1 the same as number 7 and number 3 the same as
14 number 9?

15 A Not with the methods we use in this decade. There
16 are methods by which it could be done.

17 Q All right. But not -- not here, at least as far as
18 you know? Not in Virginia in 2011?

19 A That's true.

20 Q In your supplemental report you conclude, on -- in
21 paragraph 20, and I'll just read it. "Drawing conclusions
22 regarding HB 5005, without the production of an
23 accompanying completely new, statewide sample plan,
24 accompanied by a block assignment file, does not allow
25 added substantial value to a discussion of the issues

Hofeller - Cross

1 involved in this case. Simply stated, Dr. Rodden's report
2 does not document how his objections would change the
3 configuration of HB 5005. Because of this, the report
4 cannot substantiate the conclusions Dr. Rodden reached."

5 That's in your conclusion of your supplemental
6 report, correct?

7 A You've stated what I said, yes.

8 Q And in the North Carolina litigation, the Cooper case
9 you were involved in, you know the state of North Carolina
10 took the same position; that it was necessary for the
11 plaintiff, in a racial gerrymander case, to produce an
12 alternative map to prove their case. You know that,
13 right?

14 MS. MCKNIGHT: Your Honor, I'd object. He's
15 asking about what's required in the case. This expert is
16 not a lawyer. He's not here to opine about what's
17 required in these cases.

18 MR. HAMILTON: Except that he just did in
19 conclusion to his report, and I think I'm entitled to
20 cross-examine him on it.

21 JUDGE PAYNE: But there's a difference between
22 what someone is required to do by law, which has the
23 Supreme Court has held -- in this case, I think -- that an
24 alternate map is not required. There's quite a difference
25 between that and whether an expert, in evaluating another

Hofeller - Redirect

1 expert's report, says that report is useless or of limited
2 utility because it lacks such a map. So you were linking
3 the legal and the opinion, and her objection is sustained
4 as to the form of the question.

5 MR. HAMILTON: Thank you, Your Honor.

6 Thank you, sir. No further questions.

7 MS. MCKNIGHT: Thank you, Your Honor. Just a
8 few questions on redirect.

9 **REDIRECT EXAMINATION**

10 BY MS. MCKNIGHT:

11 Q Dr. Hofeller, did you hear plaintiffs' counsel say a
12 number of times that each census block is treated the
13 same? Did you hear him say that?

14 A Not quite that. But yes, something very similar.

15 Q And the number of the people is different in each
16 census block; isn't that right?

17 A That's correct.

18 MS. MCKNIGHT: Thank you, Dr. Hofeller. I have
19 no further questions.

20 JUDGE PAYNE: Mr. Hamilton, so I can make my
21 notes correspond to the exhibit, what paragraph were you
22 asking him about in his report? I thought it was
23 paragraph 20 and it's obviously not. The last question
24 that you were asking about a map and his assessment of
25 Dr. Rodden's report.

Hofeller - Redirect

1 MR. HAMILTON: Paragraph 21, page 7 of
2 Dr. Rodden's first supplemental declaration. That's his
3 2017 report, sir.

4 JUDGE PAYNE: Oh, it was 7.

5 MR. HAMILTON: That's from Dr. Hofeller.
6 Hofeller.

7 JUDGE PAYNE: It's the '17 report?

8 MR. HAMILTON: Correct.

9 JUDGE PAYNE: I'm sorry. I had the wrong
10 report. Thank you. All right. Can Dr. Hofeller be
11 excused?

12 MS. MCKNIGHT: Yes, he may, Your Honor.

13 JUDGE PAYNE: Thank you very much for being with
14 us and giving us your testimony, sir. You may be excused.

15 THE WITNESS: You're welcome.

16 (Witness stood aside.)

17 JUDGE PAYNE: Any other evidence by the
18 defendants or intervenor-defendants?

19 MS. MCKNIGHT: No, Your Honor.
20 Defendant-Intervenors rest.

21 JUDGE PAYNE: Rebuttal.

22 MR. COX: Your Honor.

23 JUDGE PAYNE: Excuse me.

24 MR. COX: Defendants do not have any additional
25 case to present. But for the record, we join the

1 arguments raised by defendant-intervenors.

2 JUDGE PAYNE: The evidence?

3 MR. COX: Correct. Yes, Your Honor. The
4 evidence.

5 JUDGE PAYNE: All right.

6 MR. HAMILTON: And, Your Honor, our witness
7 appears to be momentarily indisposed. If I can be excused
8 for a moment, I think I know where to find him.

9 JUDGE PAYNE: Well, do you have another witness?
10 We can give that -- give him a reasonable break. Does it
11 make any difference what order you put them on in?

12 MR. HAMILTON: No, it doesn't.

13 JUDGE PAYNE: Okay. Go ahead with your other
14 one. Who's going to do that, Ms. Khanna or her
15 Ms. Branch?

16 MS. BRANCH: Your Honor, the plaintiffs call
17 Senator McClellan to the stand.

18 JUDGE PAYNE: Here comes a witness. Is this the
19 witness you wanted?

20 MR. HAMILTON: That is. Yes.

21 JUDGE PAYNE: If Senator McClellan is going to
22 be short and you can let her go, maybe it's better to do
23 her now. Would you prefer that, Senator McClellan.

24 SENATOR MCCLELLAN: Yeah.

25 JUDGE PAYNE: Okay. Come on.

McClellan - Direct

1 MR. HAMILTON: Well, thank you, Your Honor,
2 for --

3 JUDGE PAYNE: That's called an air ball.

4 THE CLERK: Shall we swear her again?

5 JUDGE PAYNE: Yes because she was excused.

6

7 **JENNIFER MCCLELLAN,**

8 called at the instance of the plaintiffs, having been

9 first duly sworn, testified as follows:

10 **DIRECT EXAMINATION**

11 MS. BRANCH: May I proceed?

12 JUDGE PAYNE: Please.

13 BY MS. BRANCH:

14 Q Good morning, Senator.

15 A Good morning.

16 Q Intervenors played a video of a house floor statement
17 made by Delegate Spruill during the 2011 redistricting
18 process. I'd like to ask you a few questions about that.
19 Was Delegate Lionell Spruill the chair of the Black Caucus
20 in 2011?

21 A No.

22 Q Has he ever been the chair of the Black Caucus?

23 A No.

24 Q When one member of the Black Caucus makes a statement
25 on the House floor, does that person speak on behalf of

McClellan - Direct

1 the entire caucus?

2 A No.

3 Q Do you know what Delegate Spruill's position was on
4 the 55 percent BVAP target?

5 A Yes.

6 Q And what was it?

7 A Delegate Spruill believed you needed a large
8 percentage to ensure that a black candidate -- a large
9 percentage of black voting age population in a district to
10 better ensure that a black candidate would be elected.

11 Q And in your opinion, was Delegate Spruill an outlier
12 from the rest of the Black Caucus on that issue?

13 A Yes.

14 Q Intervenors' counsel has indicated that you testified
15 that VTD 703 was split to preserve a community of
16 interest. Were you involved in negotiating the precinct
17 703 split in your district?

18 A Yes.

19 Q And did you want to split it?

20 A No.

21 Q Why was it split?

22 A In order to get the numbers for my district and the
23 70th to 55 percent BVAP and one percent population
24 deviation, it needed to be split.

25 Q And did the split of precinct 703 have anything to do

McClellan - Cross

1 with the addition or making whole a precinct 208 in your
2 district?

3 A Yes.

4 Q How so?

5 A Well, to equalize the number of votes that came in
6 from 208, that made it difficult to then pick up all of
7 703 in the 71st District. But if you put all of 703 in
8 the 70th District, then the BVAP for 71 would go down.

9 Q And was precinct 208 majority white?

10 A Yes.

11 Q You testified that precinct 703 is a split on a
12 natural boundary line. What natural boundary line is
13 that?

14 A A major street.

15 MS. BRANCH: No further questions. Thank you.

16 JUDGE PAYNE: Any questions?

17 **CROSS-EXAMINATION**

18 BY MS. MCKNIGHT:

19 Q Good morning, Senator McClellan.

20 A Good morning.

21 Q Just a few questions for you. You would agree,
22 wouldn't you, that reasonable minds can disagree as to
23 whether -- as to the application of a 55 percent BVAP
24 goal?

25 A Yes.

McClellan - Cross

1 Q And did you ever say on the floor that you disagreed
2 with using a 55 percent BVAP goal?

3 A No.

4 Q And did you ever tell Delegate Jones that Delegate
5 Spruill did not speak for you?

6 A No.

7 MS. MCKNIGHT: Thank you, Senator McClellan. No
8 further questions.

9 JUDGE PAYNE: Can she be excused permanently?

10 MS. BRANCH: Yes, she may, Your Honor.

11 JUDGE PAYNE: Thank you for being with us --

12 THE WITNESS: Thank you.

13 JUDGE PAYNE: -- Senator McClellan. You may go
14 about your business.

15 THE WITNESS: Thank you.

16 (Witness stood aside.)

17 MR. HAMILTON: Plaintiffs call Dr. Rodden to the
18 stand.

19 JUDGE PAYNE: Dr. Rodden, you haven't been
20 excused. I remind you you're under the same oath which
21 you took earlier in these proceedings.

22 **JONATHAN RODDEN,**

23 called at the instance of the plaintiffs, having been
24 previously sworn, testified as follows:

25 **DIRECT EXAMINATION**

Rodden - Direct

1 BY MR. HAMILTON:

2 Q Good morning, Dr. Rodden.

3 A Good morning.

4 Q We've heard some testimony about the availability of
5 political data at the census block level. And I don't
6 actually think there's much dispute, but I just want to
7 make sure we're clear about that. Vote share by elections
8 in the Commonwealth of Virginia is reported at the voting
9 tabulation district level; is that right?

10 A Yes.

11 Q So is it possible to de-allocate that vote share to
12 the census block level, or if you do that, what do you
13 get?

14 A One simply spreads those votes.

15 JUDGE PAYNE: Wait a minute. Those are two
16 questions, and I think I'd like to hear them separately,
17 if you don't mind.

18 MR. HAMILTON: Sure.

19 Q Is it possible to de-allocate the vote total or vote
20 share at the VTD level down to the census block level?

21 A Yes.

22 Q And if you do that, what do you get?

23 A One simply spreads those votes from the VTDs into the
24 blocks evenly according to population. So, in other
25 words, one takes 60 percent democratic vote share and

Rodden - Direct

1 simply spreads those votes evenly across the blocks.
2 That's what the Maptitude software does when one inputs
3 VTD level, political data and wants to examine it at the
4 block level.

5 Q Does that actually reflect the vote share within
6 those census blocks that were actually cast in those
7 census blocks?

8 A No.

9 Q Why not?

10 A Because we don't have any data at the block level,
11 we're simply imagining -- we're making an assumption that
12 democrats are evenly distributed throughout the VTD. When
13 I say "we," I mean anyone using Maptitude.

14 Q And would that be a fair assumption or an accurate
15 assumption?

16 A Not in my experience, no.

17 Q And why not?

18 A Because democrats and republicans tend to be -- tend
19 to live in different parts of VTDs in many cases.

20 JUDGE PAYNE: What's that?

21 THE WITNESS: Democrats and republicans are not
22 evenly distributed within VTDs in many cases. They can be
23 clustered by neighborhood. Say if the VTD has a railroad
24 track running through it or there's a different type of
25 neighborhood on one side of that track or highway or

Rodden - Direct

1 whatever it might be, then we can receive very different
2 political behavior on different sides.

3 Q Maybe this is a different way. Let's imagine a world
4 in which election results were only reported by
5 legislative districts, like so the whole House District 71
6 was reported just at that level. Would that tell you
7 anything about which VTDs were more democratic or less
8 democratic than other VTDs?

9 A No.

10 Q Is that sort of same thing that's happening here,
11 just at a smaller level?

12 A Yes. The problem is when we try to disaggregate
13 something where we don't actually have the disaggregate
14 data, we have to make some really bold assumptions.

15 Q And we've seen in this case some pretty significant
16 differences in the political performances of different
17 VTDs within these specific challenged districts; is that
18 right?

19 A Yes.

20 JUDGE PAYNE: Excuse me. You're making bold
21 assumptions to do what, now?

22 THE WITNESS: If I want to take VTD-level
23 election results and assume that every census block within
24 that VTD exhibits the same political behavior, I consider
25 that to be a bold assumption.

Rodden - Direct

1 JUDGE PAYNE: What does a bold assumption mean
2 in your world, in terms of how useful it is? In my world,
3 a bold assumption is not of any utility. I'm curious
4 about in your world, what -- of what utility an assumption
5 of that nature is?

6 THE WITNESS: Yes. Sometimes it's useful to
7 make an assumption if we have no other alternative.

8 JUDGE PAYNE: You mean even a bold assumption?

9 THE WITNESS: Sometimes. So in this situation,
10 what is happening is someone is sitting at a computer and,
11 as we saw in those demonstrations, moving around census
12 blocks. And one wants to then add up the votes for
13 democrats and republicans in the new district. So one
14 doesn't want to get an error, one doesn't want to get a
15 message that says I don't know how many democrats there
16 are, one wants a number even if that number is based on a
17 bold assumption.

18 JUDGE PAYNE: What's wrong with just accepting
19 the fact that we don't know and living with that in
20 whatever analysis that needs to be made, whether in the
21 legal world or your world?

22 THE WITNESS: The -- what's wrong with making
23 the assumption?

24 JUDGE PAYNE: What's wrong with accepting the
25 fact that you shouldn't make an assumption except for

Rodden - Direct

1 generally accepted reasons and leaving it be and doing the
2 analysis without considering the bold assumption that you
3 make --

4 THE WITNESS: Because if we didn't make --

5 JUDGE PAYNE: -- in your world.

6 THE WITNESS: -- any assumption -- if I was in
7 the role of Dr. -- of Mr. Morgan and I was drawing a
8 district and I wanted to report to Delegate Jones the
9 political values -- the democratic performance score
10 associated with a district that I had just created that I
11 was proud of, I wanted to say, This is the score of this
12 district and that district had some --

13 JUDGE PAYNE: That's not what I asked you. I
14 asked you in your world, in your analysis, that's wrong
15 with just accepting that a bold assumption cannot be made
16 and you ought to use the tools that you do have instead of
17 assuming?

18 THE WITNESS: In my work, in my report, I didn't
19 make any assumptions about -- about this. This -- I was
20 asked about how --

21 JUDGE PAYNE: I take it that you can't answer
22 the question about whether you should do it or not do it?
23 You just shifted from whether you should or could to
24 whether you did, and those are two different questions.

25 THE WITNESS: If I was trying to draw districts

Rodden - Direct

1 and report to someone the political score for that
2 district, I would need to make that assumption in order to
3 report a score. Otherwise, I would say I don't know
4 because the VTD was split. I don't know how many
5 democrats are in my new district that I just created
6 because the VTD was split.

7 JUDGE PAYNE: All right.

8 THE WITNESS: So if I want that score --

9 Q Let me ask a clarifying question or two. That
10 assumption is just wrong, isn't it? The assumption that
11 democrats and republicans are evenly split?

12 A Yes.

13 Q And, in fact, Judge Payne is correct. We don't
14 actually know. And so for the purposes -- if you
15 really -- if you had to put your hand on that Bible and
16 swear how many democrats, how many republicans are in that
17 census block, you'd have to say I don't know?

18 A Correct.

19 Q Because none of us do?

20 A Correct.

21 Q And if Maptitude generates something, it's just
22 diluting you because it's not an actual real value that
23 has any data that's reliable beneath it?

24 A Because you want a number, and it gives you a number
25 based on an assumption.

Rodden - Direct

1 Q That's wrong?

2 A Correct.

3 Q All right. Let's -- let's move on to census block
4 geography. We've heard testimony that the geography of
5 these census blocks and the size and shape and placement
6 of them imposed meaningful restrictions in how these VTDs
7 were split. Do you recall hearing that?

8 A Yes.

9 Q Is that true?

10 A No. The census blocks are very small, and there are
11 some of them and quite -- and many of them along the
12 relevant borders. So the number of options that one had
13 in splitting those VTDs were very, very high. A very
14 large number of options, very few constraints.

15 Q And how do you know that?

16 A I've explored the data. I've stared at the VTD and
17 block boundaries and tried to -- tried to think about all
18 the different ways that these VTDs could be split.

19 Q And when you did that, you were able to look at the
20 same maps you generated but with the VTD boundaries
21 along --

22 A Yes. The only reason I didn't include the VTD
23 boundaries in all of the maps is because it's an esthetic
24 decision. We -- the human eye can only take in so much
25 information, and if I had placed all those block

Rodden - Direct

1 boundaries on the map, it would have been overwhelming.
2 They were already, I think, very difficult to see. We had
3 trouble squinting at the VTD names and so forth. I
4 couldn't have put all that additional ink on the map.

5 Q So let me ask you this. Does the geography or the
6 size, shape and placement of those census blocks require
7 that VTDs be split along racial lines?

8 A No.

9 Q All right. There were some questions about House
10 District 80. And maybe we can call up for a moment
11 illustrative 58, House District 80.

12 JUDGE PAYNE: This is Plaintiffs' Exhibit 69?

13 MR. HAMILTON: That's correct, Your Honor. And
14 page 53, it's Figure 18. And in the illustrative notebook
15 that I had prepared at the beginning, it's on page 58.
16 That's just a larger image of the same document.

17 Q This -- we heard some testimony about a delegate name
18 Johnny Joannou? Did you recall hearing that?

19 A Yes.

20 Q And I believe -- he was the incumbent in which
21 district?

22 A Seventy-nine.

23 Q And can you -- is the location of his residence
24 plotted on this map?

25 A Yes. It's the yellow dot.

Rodden - Direct

1 Q Can you circle it?

2 A It is located in the VTD numbered 35.

3 Q Okay. That's sort of, more or less, dead center of
4 this map; is that right?

5 A Yes.

6 Q He lived -- so is that -- that's the north side of
7 the -- that the Elizabeth River there?

8 A Yes.

9 Q When he was challenged in a primary in 2009 just
10 before redistricting, how did he do in precinct 35?

11 A That was his home, his home precinct. He got a large
12 majority.

13 Q Okay. How about precinct 34, immediately next to his
14 district?

15 JUDGE PAYNE: What year are we talking about,
16 Mr. Hamilton?

17 MR. HAMILTON: 2009.

18 JUDGE PAYNE: Thank you.

19 A That's right next to his home, and he also got a
20 large majority in that precinct.

21 Q And how did he do in precinct 38? That's the next
22 one moving north.

23 A Also a comfortable majority.

24 Q And then how did he do in Taylor Road?

25 A The same.

Rodden - Cross

1 Q And how did he go in Yeates?

2 A The same.

3 Q And these are all -- excuse me. This is in a
4 democratic -- pardon me, Your Honor.

5 JUDGE PAYNE: Get some water if you need it.

6 MR. HAMILTON: That's okay. I think I'm all
7 right, but thank you.

8 Q This is in a democratic primary in 2009; is that
9 right?

10 A Yes.

11 Q What happened to all four of those precincts?

12 A They were moved into District 80.

13 Q So they were taken out of his district, Johnny
14 Joannou's district?

15 A Yes.

16 Q And then what happened in the primary election in
17 2013?

18 A He was defeated.

19 Q And who did he lose to? Where did that candidate
20 come from?

21 A That was a candidate from the other side of the
22 Elizabeth River.

23 MR. HAMILTON: Thank you, sir. No further
24 questions.

25 JUDGE PAYNE: Cross-examination.

Rodden - Cross

CROSS-EXAMINATION

1
2 BY MR. BRADEN:

3 Q Good morning.

4 A Good morning.

5 MR. BRADEN: If we could bring up the
6 demonstrative.

7 JUDGE PAYNE: What demonstrative is it?

8 MR. BRADEN: And it is -- do we have a number on
9 it?

10 JUDGE PAYNE: Was this one of the ones that was
11 excluded on objection?

12 MR. BRADEN: No. It is not --

13 JUDGE PAYNE: This is the one that was admitted?

14 MR. BRADEN: This is the one that was admitted.

15 JUDGE PAYNE: All right.

16 MR. BRADEN: This one was used by Mr. Morgan.
17 He was disusing Mr. Morgan. I wanted to ask him --

18 MR. HAMILTON: Before you do that, just for the
19 record, this was not admitted. This is an illustrative
20 exhibit so it's not part of the record. I just want to
21 make sure that's clear. I think counsel may have just
22 misspoke.

23 JUDGE PAYNE: Yeah, I think so. It's an
24 illustrative exhibit. It was -- or a demonstrative, and
25 it was not admitted. It was used to help Delegate --

Rodden - Cross

1 Mr. Morgan in his testimony.

2 Q And I believe you just testified to how the software
3 that was used by Morgan and was used by Delegate Jones
4 would, during this process, deaggregate election data out
5 to census blocks, correct?

6 A Yes.

7 Q And then -- so that would then create a screen, a
8 number, when you move the census blocks, out for all the
9 political values contained in the little box here?

10 A Yes.

11 Q So when I move -- when I divided a VTD in two pieces
12 and put one into, say, District 10 on the map here,
13 correct, that would then show the Obabma vote versus --
14 the democrat versus republican vote in all of those
15 categories? It would change and show a different value?

16 A When a VTD was moved?

17 Q Yes.

18 A Yes.

19 Q And if I had the obligation to present a plan to a
20 delegate to attempt to convince him to vote for that plan,
21 do you think that data would be of importance?

22 A I believe so.

23 Q So the process, then -- do you have any reason to
24 believe many delegates would understand the deaggregation
25 being possibly challengeable by a statistician like

Rodden - Cross

1 yourself?

2 A Do I believe that the delegates would be concerned
3 about --

4 Q Do you think they would understand your position that
5 this is not the best data available -- I mean may have
6 some data questions?

7 A No. They would like to have a number. That's why
8 the software produces one for them.

9 Q And so this number is very important -- am I
10 correct -- would you view this number important to
11 achieving the political goal of getting the plan passed?

12 A Yes.

13 Q How large can census blocks be, in population
14 numbers?

15 A There's a range. I think they sometimes can be as
16 high as a thousand.

17 Q So a census block with a thousand persons in it total
18 pop would be larger than the 1 percent range in the -- the
19 range here would be -- the variation is 1 percent plus or
20 minus. So would a census block of a thousand person alone
21 be enough if you had perfect population? If you moved one
22 census block of a thousand people, it would take it out of
23 the population range, right?

24 A Yes.

25 MR. BRADEN: No further questions.

Palmer - Redirect

1 JUDGE PAYNE: Any redirect, Mr. Hamilton?

2 MR. HAMILTON: Just briefly.

3 JUDGE PAYNE: I thought you were going to
4 surprise any.

5 MR. HAMILTON: What's that?

6 JUDGE PAYNE: I thought we weren't going to have
7 any for a minute.

8 MR. HAMILTON: I have no notes, Your Honor.

9 **REDIRECT EXAMINATION**

10 BY MR. HAMILTON:

11 Q This Maptitude software we've been discussing --

12 A Yes.

13 Q -- is this the same in every state? Obviously,
14 there's different data fed into it, but the program is the
15 same in every state?

16 A Yes.

17 Q So the Maptitude program you use to redistrict, say,
18 the state of Alabama is the same software used to
19 redistrict the state of Virginia?

20 A Yes.

21 Q Same in North Carolina?

22 A Yes.

23 Q Same in Ohio?

24 A Yes.

25 MR. HAMILTON: Thank you. No further questions.

Rodden - Recross

1 JUDGE PAYNE: You're frowning and complaining,
2 Mr. Braden. What's the problem here? Is that an
3 objection or what? I haven't ever seen a frown objection.

4 MR. BRADEN: I don't think the Court is going to
5 let me ask him any more questions. I think he may
6 have misspoke.

7 JUDGE PAYNE: Well, let's get it straight so go
8 ahead. That gives Mr. Hamilton a recross, but let's get
9 it straight. Come up here where they can hear you and I
10 can hear you and the court reporter can hear you.

11 **RECROSS-EXAMINATION**

12 BY MR. BRADEN:

13 Q Do you actually know whether all states use
14 Maptitude? Aren't there a number of different softwares
15 that some states use?

16 A He asked me if Maptitude was the same in every --
17 whether they were different versions of Maptitude in
18 different states was my understanding. And --

19 Q I misunderstood. I thought -- thought you had
20 answered a question saying that the state of Alabama used
21 Maptitude, but you don't know whether they did or didn't?

22 A No. There are competing software vendors. I don't
23 know.

24 JUDGE PAYNE: All right. You have the final
25 shot.

Palmer - Direct

1 MR. HAMILTON: Thank you, Your Honor. And I
2 have -- I'm not frowning, and I don't need to ask any more
3 questions. Thank you.

4 JUDGE PAYNE: All right. Is that the -- you can
5 step down. Thank you, Dr. Rodden, for being here.

6 Are you all through now?

7 MS. KHANNA: We have one more witness, Your
8 Honor.

9 JUDGE PAYNE: About how long? Probably not more
10 than that. Make sure your chronometer keeps it in that
11 zone. Will you, please?

12 MS. KHANNA: Plaintiffs recall Dr. Maxwell
13 Palmer.

14 JUDGE PAYNE: And, Dr. Palmer, I remind you,
15 you're under the same oath that you took earlier, you
16 haven't not been excused.

17 **MAXWELL PALMER,**

18 called at the instance of the plaintiffs, having been
19 previously sworn, testified as follows:

20 **DIRECT EXAMINATION**

21 BY MS. KHANNA:

22 Q Good morning, Dr. Palmer.

23 A Good morning.

24 Q You submitted a reply report in this case; is that
25 right?

Palmer - Direct

1 A Yes.

2 Q And I believe you've already identified that on the
3 record as Plaintiffs' Exhibit 72?

4 A Yes.

5 Q We're not going to walk through all of the analyses
6 in the reply report since it is already in the record, but
7 I just wanted to touch upon a few key points. You read
8 the rebuttal reports provided by Dr. Katz and Dr. Hood; is
9 that right?

10 A Yes.

11 Q And you heard them testify in court?

12 A Yes.

13 Q Did you -- did anything that you read or heard from
14 their testimony alter your conclusion regarding racial
15 predominance in any way?

16 A No.

17 Q Why not?

18 A Dr. Hood did not evaluate or did not offer evidence
19 on racial predominance. Dr. Katz only challenged one of
20 my several analyses on racial predominance; that of the
21 effect of race versus party on the assignment of VTDs to
22 challenged districts. And, in fact, the evidence he
23 presented in his report only confirmed my -- my
24 conclusions.

25 Q And your conclusion in terms of the race versus party

Palmer - Direct

1 analysis, what did it confirm that?

2 A That race predominated over party in the assignment
3 of VTDs to the challenged districts.

4 Q What about your conclusions regarding racially
5 polarized voting or the necessity of the 55 percent BVAP
6 rule? Did anything that you heard from the testimony or
7 read in the testimony of Dr. Katz or Dr. Hood change your
8 conclusion in any way?

9 A No.

10 Q Why not?

11 MS. MCKNIGHT: And, Your Honor, here I'd object.
12 Dr. Palmer's reply report, the section on racial
13 polarization, relies on data from elections postdating
14 2011. In defendant-intervenors' direct case, we
15 understood from the Court that we were not to go into
16 elections postdating 2011.

17 So not only does this not rebut anything that was
18 said yesterday, it also deals with information that you
19 asked us to exclude from our presentation.

20 MS. KHANNA: Your Honor, I'm asking whether he
21 has heard anything about racially polarized voting or the
22 necessity of the 55 percent threshold rule, both on topics
23 that are addressed -- were addressed during the reports
24 and testimony, whether that changed any of his
25 conclusions. It's just the substance of his rely report.

Palmer - Direct

1 JUDGE PAYNE: Well, the report does have a lot
2 of post 2011 material in it, and to the extent you're
3 asking about it, you can't ask about it.

4 And the problem is creating by asking this question,
5 and that is, does it change your opinion, why not. That
6 opens the door to a ramble, and it's not -- I think you
7 just can tailor your own questions if you want them
8 answered to get to that point.

9 MS. KHANNA: Thank you, Your Honor.

10 JUDGE PAYNE: But then we don't have a rambling
11 answer that will implicate the 20 -- post 2011 data that
12 they were precluded from using and that you can't use
13 either.

14 MS. KHANNA: Thank you, Your Honor.

15 Q Dr. Hood provided some analyzes about reasons why a
16 map drawer might want to raise the black voting age
17 population in a given challenged district or majority
18 minority district. Did any of his analyses change your
19 conclusions regarding the necessity of a 55 percent BVAP
20 floor in any of the challenged districts?

21 A No.

22 Q And why is that?

23 JUDGE PAYNE: That's the problem.

24 BY MS. KHANNA:

25 Q To what --

Palmer - Direct

1 JUDGE PAYNE: You have to ask the question on
2 the topic that you want to ask where is here. His whole
3 report and his whole opinion can be affected by things
4 that we can't let in or we've kept for them and they have
5 to come out for you. So maybe you can rephrase your
6 question.

7 MS. KHANNA: And for the record, I'm asking
8 solely Dr. Hood's suggestions as to what might motivate a
9 map drawer to draw a -- to increase the BVAP in a given
10 district.

11 JUDGE PAYNE: Do you know of anything that might
12 motivate a map drawer? Let's start with that. And then
13 if the answer is yes, okay. Then you'll follow up.

14 Q Let me rephrase it. Do you recall the portion of
15 Dr. Hood's report specifying reasons why a map drawer
16 might want to raise the BVAP in a given majority minority
17 district?

18 A Yes.

19 Q Did you hear him testify about those reasons one by
20 one yesterday?

21 A Yes.

22 Q Did any of those reasons change your decision -- or
23 your conclusion about the necessity of the 55 percent BVAP
24 rule?

25 A No. Dr. Hood raised several concerns --

Palmer - Direct

1 JUDGE PAYNE: That's enough at this stage. No.
2 And then she can ask any follow-up questions that she'd
3 like to ask.

4 Q Did you see any analyses provided by Dr. Hood to
5 substantiate those concerns?

6 A There was one analysis of a primary election in a
7 House of Delegates race from 2009 that Dr. Hood offered.
8 However, I do not find his conclusions there meaningful
9 because while Dr. Hood did an ecological inference
10 analysis, he neglected to include confidence intervals or
11 any measure of uncertainty on his own statistical
12 analysis. And so we have no way of interpreting those
13 results to know if they are statistically significant and
14 if there are actual meaningful differences between racial
15 voting patterns between whites and African-American
16 voters.

17 Q Dr. Palmer, in Dr. Hood's report, he suggested that
18 looking at primary elections may inform the racially
19 polarized voting analysis in some way. Do you recall
20 that?

21 A Yes.

22 Q And as we've already discussed, one of the primaries
23 he looked at was a 2013 primary, and he also looked at
24 2009 primary that you just spoke about; is that right?

25 A Yes.

Palmer - Direct

1 Q Did you examine any primaries in response to Dr. Katz
2 or Dr. Hood's reports?

3 A Yes. I also looked at the 2013 democratic primary
4 for Attorney General as well as the 2008 democratic
5 primary for president.

6 Q And I'm not going to ask any --

7 JUDGE PAYNE: That's the problem. You're going
8 beyond the answer, Dr. Palmer. You just elicited on
9 objection. Now, what is the objection?

10 MS. MCKNIGHT: Your Honor, we'd object to any
11 testimony about any until analysis he did on data that was
12 postdating 2011.

13 MS. KHANNA: And I will not ask any questions
14 about it, Your Honor.

15 JUDGE PAYNE: Do you see why it's necessary to
16 listen to the question. Just answer the question.
17 Because once you go beyond, then we have all this to deal
18 with. All right. So the objection is sustained. The
19 answer is stricken. You may start again.

20 BY MS. KHANNA:

21 Q Dr. Palmer, did you review any primaries predating
22 2011 in response to Dr. Hood and Dr. Katz's analyses?

23 A Yes.

24 Q What primary did you examine?

25 A The 2008 primary for the -- the democratic primary

Palmer - Direct

1 for president.

2 Q And why did you look at that primary?

3 A Dr. Katz suggests that looking at a primary where
4 there's an African-American candidate running against a
5 white candidate could be useful. Dr. Hood suggests this
6 as well. The 2008 democratic primary was the most recent
7 statewide primary with an African-American candidate
8 running against a white candidate available at the time of
9 the map drawing.

10 Q That primary would have been available -- the
11 information would have been available to anyone drawing
12 maps in 2011, correct?

13 A Yes.

14 Q Can you please turn to page 12 of your reply report?
15 And that is Plaintiffs' Exhibit 72, page 12. And this is
16 Figure 4. Does this figure reflect your racially
17 polarized voting analysis of the 2008 democratic primary
18 for president?

19 MS. KHANNA: Trish, can we make it a little
20 bigger so we can see?

21 Q Does this figure reflect your racially polarized
22 voting analysis of the 2008 democratic primary for
23 president?

24 A Yes.

25 Q And is that basically all of the data points on the

Palmer - Direct

1 left side of each cell?

2 A Yes.

3 Q What does this figure reflect about racially
4 polarized voting in the 2008 democratic primary for
5 president?

6 A This figure shows no evidence of racially polarized
7 voting between African-American and white voters in the
8 2008 democratic primary for president in all 12 districts.

9 In 11 of the 12 districts, I actually find strong
10 evidence that a majority of white voters were also voting
11 for the African-American preferred candidate. Only
12 District 77 do I find inconclusive evidence of
13 polarization, and in no district do I find evidence that
14 white voters are polarized against the African-American
15 preferred candidate.

16 Q What did you conclude from your analysis of this
17 primary?

18 A There is broad support for African-American preferred
19 candidates in this primary, and the African-American
20 preferred candidate won this primary in all 12 districts
21 by a large margin.

22 Q Thank you. Dr. Palmer, you were in the courtroom
23 yesterday when both Dr. Katz and Dr. Hood were asked how
24 long they had to prepare their analyses, correct?

25 A Yes.

Palmer - Direct

1 Q Do you recall how long you had to prepare your reply
2 report in this case?

3 A Two weeks.

4 Q And how many new elections did you perform ecological
5 inference analyses on in your reply report?

6 A Six.

7 Q How many districts were included in each of your
8 racially polarized voting analyses?

9 A Twelve.

10 Q Can you tell me approximately how long it took to
11 gather election data for any of these -- for all of these
12 elections?

13 A Only a day or two.

14 MS. MCKNIGHT: Your Honor, I'd object here
15 again. The data she's referring to is data postdating the
16 2011 election.

17 MS. KHANNA: Your Honor, yesterday testimony was
18 admitted and it was not stricken or not deemed irrelevant
19 about how long it took their experts to get the
20 information they needed to provide their analyses.

21 JUDGE PAYNE: Do you want to ask him how long it
22 took him to get his information up to 2011 elections and
23 cut out the 2013?

24 MS. KHANNA: Your Honor, I believe the --

25 JUDGE PAYNE: I think that -- let's -- we need

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1 to get going, and this is basically -- it is utterly
2 irrelevant how long somebody took to give you their report
3 if everybody is playing on the same field. The fact that
4 they had little trouble with it or had to work hard is not
5 something that generally is considered by finders of facts
6 at all. Maybe juries do it, but we don't do it.

7 MS. KHANNA: Thank you, Your Honor.

8 JUDGE PAYNE: Let's go. That's not helpful to
9 us.

10 Q Were you here during Dr. Katz's testimony yesterday
11 when he spoke about some confusion between ACS data and
12 census data?

13 A Yes.

14 Q Now, the decennial census, that's an actual count of
15 people; is that right?

16 A That's right.

17 Q And that takes place how often?

18 A Every ten years.

19 Q What information is provided on the census form?

20 A For each individual, the census records age, gender,
21 race and ethnicity.

22 Q That is the only data available on the census block
23 level?

24 A Yes.

25 Q What is the American Community Survey to which

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1 Dr. Katz referred, also known as the ACS, I believe?

2 A The ACS is a survey run by the Census Bureau that
3 collects information on a large variety of demographic
4 factors.

5 Q Like what?

6 A Education, income, employment. There's a very large
7 number of variables.

8 Q And in what ways is the ACS, in terms of its --
9 sorry. It terms of how often ACS data is collected, how
10 is that different than the census?

11 A The ACS is I believe run every year and then new
12 information is released annually. But this is a survey.
13 And so unlike the census, which is a count, is provided
14 only estimates, not actual counts.

15 Q And is ACS data reported at the census block level?

16 A No.

17 Q So the only data that is available at the census
18 block level is census data; is that correct?

19 A That's right.

20 MS. KHANNA: Thank you, Dr. Palmer. I have no
21 further questions.

22 JUDGE PAYNE: Any cross-examination?

23 MS. MCKNIGHT: No, Your Honors. I have none.

24 JUDGE PAYNE: All right. Thank you, Dr. Palmer.
25 You're excused.

1 (Witness stood aside.)

2 JUDGE PAYNE: Is that the end of your case?

3 MR. HAMILTON: It is, Your Honor.

4 JUDGE PAYNE: All right. You all -- we asked
5 you to do an argument. We'll take a 20-minute recess,
6 come back and hear the arguments.

7 MR. HAMILTON: Thank you, Your Honor.

8 JUDGE PAYNE: Will that give you enough time to
9 pull your things together?

10 MR. HAMILTON: It will, Your Honor. We
11 anticipated this.

12 JUDGE PAYNE: Oh, you did?

13 MR. HAMILTON: You know, you have to be
14 prepared.

15 JUDGE PAYNE: Oh, I thought we gave tells.

16 (Recess taken.)

17 JUDGE PAYNE: All right.

18 MR. HAMILTON: Thank you, Your Honor. On behalf
19 of the plaintiffs and the lawyers and the staff in the
20 courtroom on the plaintiffs' side, I want to thank you all
21 for your time and patience and attentiveness during the
22 course of the trial over the last few days. It's been an
23 honor to appear before you, and I thank you for your
24 courtesy and that opportunity.

25 The evidence presented during the course of this

1 trial makes clear that during the course of the 2011
2 redistricting, the 11 remaining House of Delegates
3 districts, the Virginia General Assembly used race as the
4 predominant factor, had no compelling State interest for
5 doing so and in all events, failed to narrowly tailor
6 those districts to that State interest.

7 Let's start with predominance. So much as changed
8 since the last time I stood before this Court. For
9 starters, the Supreme Court has now clarified the
10 governing legal standard and provided expressed, clear
11 direction for this Court. To be clear, and contrary to
12 Mr. Braden's opening statement, the Supreme Court actually
13 agreed with plaintiffs' understanding of the governing
14 legal standard. Specifically, the Court affirmed that
15 race predominates when, quote, race was the predominant
16 factor motivating the legislature's decision to place a
17 significant number of voters within or without a
18 particular district.

19 The Court rejected intervenors' interpretation of the
20 predominance standard. As the Court explained, that
21 approach foreclosed a holistic analysis of each district
22 and led the District Court to give insufficient weight to
23 the 55 percent BVAP target and other relevant evidence
24 that race predominated. The Court emphasized the
25 necessity of examining the design of the district as a

1 whole and said, quote, Concentrating on particular
2 portions in isolation may obscure the significance of
3 relevant district-wide evidence, such as stark splits in
4 the racial composition of populations moved into and out
5 of disparate parts of the district or the use of an
6 expressed racial target. A holistic analysis is necessary
7 to give that kind of evidence its proper weight, closed
8 quote.

9 The relevant district-wide evidence called for by the
10 Court literally abounds in the record before this Court.
11 Two factors: Stark splits in the racial composition of
12 populations moved into and out of disparate parts of the
13 district, and the expressed use of racial targets. So
14 let's start with the second one first, the use of an
15 expressed racial target.

16 And we don't really have to spend a whole lot of time
17 on this. It's undisputed and, in any event, law of the
18 case; a 55 percent black voting age population expressed
19 racial target was developed based largely on concerns
20 relating to House District 75 and then, in the words of
21 the Supreme Court, quote, applied across the board to all
22 12 districts, closed quote, and despite -- and that
23 despite profound differences between the 12 districts,
24 some urban, some suburban and some rural.

25 Now, intervenors would like you to think that the

1 mere existence of this 55 percent rule is plaintiffs'
2 entire case start to finish. Mr. Braden said as much in
3 his opening statement. But, of course, in truth,
4 plaintiff has always argued to this Court and to the
5 Supreme Court that Delegate Jones employed a rigid
6 mechanical quota and that that rigid mechanical quota had
7 a direct and significant impact on the actual boundaries
8 of the challenged districts.

9 The evidence you've heard over the last few days
10 vindicates plaintiffs' position. Delegate Jones admitted
11 not only that he considered race, which, of course, he had
12 to, but that it dramatically affected the construction of
13 those districts. In District 71, for example, he
14 testified that he could not move the district to the west
15 because it would, his word, dilute the black voting age
16 population too much.

17 He admitted that he added black VTDs and dropped
18 predominately white VTDs all in the service of the 55
19 percent rule. And that rule trumped all other criteria.
20 He admitted both in principle that the 55 percent black
21 voting age population rule predominated over other
22 redistricting criteria and in practice. And, of course,
23 he had to, again, because the evidence abounds. The plan
24 split counties, cities, assigned whole VTDs on the basis
25 of race and, perhaps most dramatically, split VTDs

1 throughout the 11 districts. Counties were split, and not
2 only split, but split expressly on racial lines. The
3 Court has already found an invalidly racial split of
4 Dinwiddie County, which, by the way, defined the boundary
5 for 63. So if it was invalidly racial for District 75,
6 then the same is necessarily true for District 63. I
7 think that's referred to in the law as the sauce for the
8 goose is sauce for the gander problem.

9 The line splitting Chesterfield, too, divides the
10 predominately black portion from the predominately white
11 portion. Henrico is splintered across -- in several ways,
12 with Delegate Jones admitting that he pushed District 71
13 into a sliver of Henrico by moving the Ratcliff VTD to
14 enhance the black voting age population of the district.

15 Cities, too, were split. And not just split, but
16 divided along racial lines. Hopewell, in District 63, is
17 perhaps the clearest example, but Richmond, too,
18 demonstrates a disregard for city boundaries. Splintering
19 The Fan district to move a heavily white democratic VTD to
20 a republican district, that was obviously for racial
21 reasons, as Delegate Jones all but admitted.

22 Whole VTDs were moved in and out of the districts to
23 balance racial populations. VTD 701, 702 and part of
24 703 -- this is all a heavily African-American area -- were
25 moved into District 71 for racial reasons. VTD Suburban

1 Park, a largely white area, was moved out of District 89
2 to adjust its racial composition. And districts lines
3 were selected, either retained from the benchmark or
4 crafted wholly out of thin air, that carefully demarcated
5 the boundaries between heavily African-American areas and
6 heavily white areas.

7 And, of course, most dramatically, VTDs were split.
8 And not just in some random way to equalize population,
9 but carefully to divide predominately African-American
10 populations from predominately white populations. The
11 evidence on this point literally jumps off the page from
12 Dr. Rodden's dot density maps. It's vivid, compelling
13 and, in the words of the Supreme Court, stark. And it's
14 exactly the same evidence that the Court considered
15 particularly compelling in the *Bush v. Vera* and Alabama
16 decisions by the U.S. Supreme Court.

17 Now, the intervenors protested -- again, in the words
18 of Mr. Braden -- that these VTD splits were, quote,
19 virtually -- not totally, but virtually, without
20 exception, every split VTD is done to equalize population
21 pursuant to the criteria, closed quote. That's from
22 Mr. Braden's opening statement. This is simply beyond
23 belief and inconsistent with the record before the Court.

24 There are innumerable ways to split a VTD to balance
25 population, but somehow, almost every time it had to be

1 done, it was done along stark racial lines. How is that
2 possible? How is that credible? We can look at several
3 examples. Hopewell, Ward 7, we saw that split. Granby in
4 District 89. For the record, Hopewell is in District 63.
5 Granby, in District 89, was split along racial lines.
6 Reon, in District 90, was split along racial lines.
7 Lakeside, District 77, split along racial lines. And
8 perhaps most dramatically, the Reservoir, Epes, Denbigh,
9 Jenkins four-way split right along racial lines.

10 Dr. Palmer testified that 23 -- in 23 out of 24 cases
11 of split VTDs, a full 96 percent of the split VTDs split
12 between challenged and nonchallenged districts followed
13 the same pattern we've seen here. They were split along
14 racial lines such that the higher black voting age
15 population is in the challenged district and the lower
16 black voting age population is in the nonchallenged
17 district.

18 There was just a single instance where that didn't
19 happen. If these VTDs were split solely to equalize
20 population, one would expect to see the splits divide
21 racial populations one way sometimes, racial populations
22 the other way sometimes. You wouldn't see a consistent
23 pattern like this 96 percent of the time.

24 Now, intervenors have pointed to other nonracial
25 goals that Delegate Jones was pursuing. But even if

1 factors other than race played some role, that's just
2 irrelevant to the analysis. Race can predominate. Race
3 does predominate even when the legislature pursues other
4 nonracial goals in addition to its racial goals. That's,
5 of course, obvious. No districting plan is done solely
6 for one reason or another. And that's exactly what
7 happened here. Every rule, every principle, every
8 criterion was, at some point, compromised with one
9 exception: The black voting age population 55 percent
10 expressed racial target.

11 So the evidence that the Supreme Court called for in
12 its decision in this case is overwhelming. There's an
13 expressed use of a racial target -- that we can just take
14 off the table since it's the law of the case -- and stark
15 splits in the racial composition of populations moved into
16 and out of disparate parts of the district. Using
17 evidence that the Supreme Court itself has held in not one
18 but two different cases is particularly relevant. That
19 establishes predominance.

20 Let me turn to narrow tailoring just for a moment.
21 It's equally clear that the General Assembly's use of race
22 was not narrowly tailored to achieve a compelling
23 government interest. For starters, intervenors offered no
24 evidence that their use of a racial target served any
25 compelling government interest. It's undisputed, and the

1 law of the case, that the 55 percent racial target was
2 created to address District 75 and then applied across the
3 board to all the challenged districts. Delegate Jones
4 admitted that his functional analysis was limited to
5 District 75. And as for the remaining districts, he
6 didn't look at voter turnout. He didn't look at racial
7 voting patterns. He didn't look at registration rates.
8 And with very few insignificant exceptions, he didn't look
9 at election results. That's not a strong basis in
10 evidence.

11 At the first trial, Delegate Jones tried to pin the
12 55 percent rule on other delegates who, according to
13 Delegate Jones, advocated for that number. As you've
14 heard during the course of this trial, Senator McClellan
15 and Delegates Howell, James and McQuinn all denied that
16 they advocated for the use of a 55 percent black voting
17 age population racial target. And Senator Dance testified
18 that the number was the gospel according to Delegate
19 Jones. I think she said that three times until the
20 Court -- and the Court even made a joke about it.

21 Delegate Jones insisted that he derived that number
22 from members of the Black Caucus, but it's telling that
23 intervenors have been unable to produce a single member of
24 the Black Caucus to corroborate Delegate Jones' statement.
25 At the same time, plaintiffs have offered testimony from

1 several African-American delegates and former delegates,
2 all of whom dispute Delegate Jones' account.

3 Before this second trial, this Court asked the
4 parties to summarize new evidence addressing factors other
5 than race that were submitted in the formation of the
6 districts. In the opening statement, intervenors were
7 unable to identify any such evidence, and not
8 surprisingly, during the course of this trial, they have
9 been unable to present any such evidence.

10 This is, at end of the day, a simple case. Delegate
11 Jones applied an expressed racial target of 55 percent
12 black voting age population to 11 very different
13 districts. That's not disputed. Pervasive racial sorting
14 was required to comply with the 55 percent rule. But
15 Delegate Jones had no reason to believe that racial
16 sorting was required to avoid retrogression, let alone a
17 strong basis in evidence. In fact, he admits that he
18 didn't even try and assess the necessary level of black
19 voting age population in any district except for District
20 75. That's also undisputed. This mechanical and
21 unjustified sorting of voters, according to the color of
22 their skin, offends the commands of the 14th Amendment.

23 With respect, plaintiffs urge this Court to
24 invalidate the 11 remaining challenged districts and
25 implement appropriate, immediate and effective remedies

1 for the constitutional violation. Thank you, Your Honors.

2 MR. BRADEN: As I said at my opening, the
3 question before this Court, the first question -- I
4 believe, really, in the end, the only question before this
5 Court -- is whether race was the predominate -- the
6 predominate factor in drawing the challenged districts.
7 The predominate factor in drawing these challenged
8 districts is the 1991 districts and the 2001 districts.
9 These are predominately the same districts that have been
10 in place since 1991. And this was clearly expressed by
11 Jones. And record is replete with evidence of that.

12 So the burden is on the plaintiffs to prove to this
13 Court that race predominated. I believe this Court has
14 already found that the plan does not, in fact, violate
15 traditional redistricting criteria. And I believe the
16 evidence already shows that, but let's hear what the
17 experts of the other side have provided to this Court that
18 show that race is predominate. And they've provided you a
19 VTD analysis. That forms basically their only argument on
20 predominance.

21 I would suggest to you that that's the -- VTD tail --
22 split VTDs are the tail on the redistricting dog. The
23 reality is that's a small part of the redistricting
24 process. Even if you were to accept that these VTDs were
25 drawn upon race, which the evidence absolutely, I

1 believe -- direct evidence shows is not true, the numbers
2 involved are simply too small. We're going to decide that
3 race is predominant because of, by definition, a split of
4 a VTD that would be less than 800 people. That's
5 1 percent. That's the range we're talking about here. So
6 we're talking about numbers. This VTD analysis involves
7 tiny, tiny numbers. Not enough to be the basis of a
8 predominance finding.

9 What a shock we would find that when you divide a
10 vote tabulation district, a precinct between two
11 districts, one of which is predominately African-American
12 and one of which is white, that the VTD that goes into the
13 black district is predominately black because it needs to
14 be contiguous. So what a surprise giving patterns of
15 residency that if you're picking a VTD between two
16 districts and you split it, the side that's closer to the
17 black district, in the black neighborhood -- let's use
18 like the reality here of what we're talking about,
19 neighborhoods. That neighborhood is likely to have more
20 black residents than the other side, which goes into what
21 could be a majority white district. That's what we're
22 discovering with any of these numbers, assuming that any
23 of them were a large enough number to be meaningful. And
24 they're not. They're just not.

25 You've seen direct testimony, first of all, that

1 Jones wasn't involved in splitting these VTDs, period.
2 He's the architect of the plan. This -- this VTD analysis
3 is based upon numbers that weren't important enough for
4 him to be involved in or even to consider except in the
5 isolated instance of doing something in the city of
6 Richmond at the request of the Richmond government. So
7 how can something not important enough for the architect
8 of the plan to be involved with or pay any attention be
9 the basis for this Court to determine that race was
10 predominant?

11 Then you have the testimony -- I know it was long. I
12 know it was extensive, but you had the testimony from the
13 person who did this directly, expressly saying it wasn't
14 based upon race. Couldn't have been clearer. There
15 wasn't any equivocation whatsoever. Was some of it
16 involved in politics? Absolutely. No one has ever denied
17 that. District 95, up at the end of it, as this Court
18 found last time, what's happening in splitting those
19 precincts? It's an expressed desire to create a more
20 attractive swing district on the peninsula and to preserve
21 a republican incumbent.

22 So are all the democrats -- is there an attempt to
23 put the democrats and split the precinct to put the
24 democrats in challenged District 95? Absolutely. So if
25 this was a political gerrymandering claim, I might make a

1 different argument. That's not before this Court. What's
2 before this Court is a racial gerrymandering claim.
3 There's no testimony of people actually involved in the
4 process showing that any of these splits are based upon
5 race. The people who did them said no. They're too small
6 to be meaningful.

7 My -- Kevin Hamilton stands up and says significant
8 number of voters is what the Supreme Court is looking for
9 being moved in and out. The VTD analysis doesn't provide
10 a significant number of voters being moved in and out even
11 if you accepted it on race. That's his language.

12 You need, as the Supreme Court said, to look at the
13 design as a whole. Are they looking at the design as a
14 whole? No. Their expert witnesses' analysis, when you
15 look about their VTD analysis weighting back and forth as
16 to what's the best predictor of a VTD being in or out, and
17 they say race is more important than politics. And that's
18 what their statistical analysis says.

19 And I won't -- you know, that's interesting. But, of
20 course, the statistical analysis that everyone agrees is,
21 in fact, the strongest statistical analysis is was it in
22 the benchmark district? If it was in the benchmark
23 district, the statistics show clearly that, by far, is the
24 best predictor of whether it will be in the new plan. Not
25 race, not politics, was it there before. Totally

1 consistent with -- totally consistent with the statements
2 of Jones and Morgan.

3 I don't believe this Court has received any evidence
4 on which it could determine that race was predominant.
5 Certainly not from the experts. You did, in fact, receive
6 some testimony from some members. I urge the Court first
7 to remember my admonition about drawing a district is
8 easy, drawing a plan is hard. Most of the testimony I
9 heard from the black members were, I wasn't happy with my
10 district. I didn't hear them -- with the exception of
11 McClellan and Dance -- talking about race. I heard them
12 say, Oh, my district wasn't the way I wanted it to be.
13 What a surprise. With the exception maybe of Jones,
14 nobody got exactly the district they wanted.

15 So what I would suggest to you is let's not listen to
16 the testimony here that appeared within the last few days.
17 Let's go back and listen to -- and I suggest listen.
18 Listen. We've got the videotapes of the floor speeches of
19 these individuals. First of all, they all voted for it.
20 But leaving that aside, go back and listen to the floor
21 speeches. We didn't bring many of them up here of the
22 members of the Black Caucus. And the support for this
23 bill on the floor from the Black Caucus was unanimous
24 except for one member who was unhappy that it wasn't more
25 than 55 percent.

1 We don't need post hoc testimony. We need realtime,
2 what was your position then. And there's lots of
3 videotape of members talking about 55 percent being the
4 appropriate number. That was at that time. Maybe
5 people's memories have changed as to where 55 percent came
6 from, but the reality, at the time it came from the Black
7 Caucus.

8 In my opinion, there's no data supporting a notion
9 that a significant number of black voters were moved in
10 and out of any district with the exception possibly of 71.
11 The numbers moved in and out move at a random pattern.
12 Half the districts went up in black voting age population.
13 Half the districts went down. If you look at Rodden's
14 report, he argues that it shows racial sorting in some
15 districts because blacks were put in and in some districts
16 because blacks were taken out. These are all challenged
17 districts. And in some districts because they were kept
18 the same. It's, you know, damned if you do, damned if you
19 don't, damned if you don't do anything is what Rodden's
20 report talks about.

21 The reality, there is not -- look at the numbers.
22 Not percentages, not little dots moving back and forth,
23 but the actual numbers. The numbers are relatively modest
24 in all the districts, really, with the exception of one,
25 and that's 71, Richmond. The benchmark plan was

1 46 percent, approximately. The incumbent member, who's
2 now a senator, was a particularly popular candidate.

3 I thought at the last trial that the plaintiffs had
4 taken the position that all the districts needed to be
5 above 50 percent. I believe that's what they argued to
6 this Court in that trial. The benchmark plan was 46. I
7 heard arguments here and briefs arguing, And we don't need
8 more than that because Senator McClellan is such a
9 popular -- you know, Senator McClellan could win so that's
10 proof that the minority candidate -- the candidate of
11 choice in the minority community -- can win.

12 And the answer is the Voting Rights Act and
13 preclearance isn't about one candidate. It's a question
14 of whether the minority community, through the next
15 decade, will be able to elect its candidate of choice.

16 Again, it's important to understand what the
17 obligation of the State is in this circumstance. The
18 State has this kind of bizarre situation when it goes to
19 the Department of Justice to get preclearance. To get
20 preclearance, they have to prove that the plan would not
21 regress in the ability of the minority community to elect
22 its preferred candidate of choice. That's an affirmative
23 duty.

24 So if you listen to their expert, his criticism of 71
25 was it didn't move west, didn't take up The Fan area and

1 the museum area. Of course, if the district had moved
2 that direction, it would have been dropped to probably
3 around 40 or 41 percent African-American black population.
4 All those numbers are already in the record as to what
5 happens if you pick up his precincts.

6 They ask us to discount the fact that there's a
7 delegate who has a family business -- actually, two family
8 businesses and grew up in 207. Somehow or another you're
9 supposed to ignore that and think that the only thing that
10 matters is that they weren't good republican districts.
11 That strikes me as incredible.

12 But let's not look at whether their expert whose
13 experience in The Fan is walking through it as a tourist
14 is better than Jones or Delegate Loupassi. Let's look at
15 the notion of what would happen if we did what they
16 suggest. You get a 40 percent -- 41 percent black voting
17 age population in District 71. We would then have to go
18 to the Department of Justice and ask them to preclear
19 that. There will have been substantial -- what does the
20 Department of Justice do in preclearance? Among other
21 things, they call up the black members of the legislature
22 and black community leaders.

23 Does anybody in this court believe we could have
24 gotten this plan precleared at 40 or 41 percent black
25 voting age population if the Black Caucus was saying we

1 needed 55? That's nonsense. Absolute nonsense.

2 We've got to have a chance to draw a plan. The State
3 should not be put in a straightjacket by the Courts. Give
4 them a chance to draw a plan. He had a goal of
5 55 percent. He didn't believe he actually reached it.
6 We're not going to relitigate which black voting age
7 numbers are the correct ones, but this was a legitimate
8 effort to comply and get a plan. The compelling State
9 interest is to get preclearance at the Department of
10 Justice. It doesn't have to do anything, in the end, with
11 anything other than that requirement.

12 I don't know how you would advise a legislative body
13 if this plan doesn't work. Was it partisan to some
14 degree? Of course. But this is a plan that got a
15 majority of the republicans. Not a surprise, they got all
16 the republicans. But they got a significant majority of
17 the democratic votes, and they got all but one vote from
18 the Black Caucus.

19 If this process doesn't work, then what process will?
20 What number do we have to use? What's the magic number we
21 need? Their argument, effectively, is I've got to hire
22 somebody from Harvard or Stanford to come in and come up
23 with some magic number, which, of course, if I hired a
24 political scientist from somewhere else would have given
25 me another number as to what the number should be. That's

1 crazy.

2 Let the legislature have, as the Supreme Court has
3 said, the right to do its duty, to be involved in politics
4 and make decisions, but you've got to give them
5 flexibility. You can't put them in a straightjacket.
6 This was a good-faith effort to adopt a plan. I don't
7 think anybody has any doubts about that. And simply, this
8 was a status quo effort. What was the predominant factor
9 involved here? After you get -- we all know what the
10 predominant factor was; get it passed and be legal and
11 have it not lose in court.

12 But if you're wanting to know the overall goal, it's
13 really pretty clear. It's status quo. That's the
14 predominant factor. Not race. Was race considered? Yes.
15 Was there a goal? Yes. But that wasn't enough at the
16 Supreme Court to make this plan subject, or any of the
17 districts in it, subject to strict scrutiny. Thank you,
18 Your Honors.

19 JUDGE PAYNE: Thank you.

20 On behalf of the Court, I think I'd like to express
21 appreciation to all counsel for a fine job litigating the
22 case, litigating zealously and behaving professionally in
23 all respects and presenting good cases for both sides.

24 I think that it would be remiss not to express
25 appreciation to Ms. Marino, Ms. Tolbert and Greer Smith

1 for the fine work that they did to get the evidence put
2 together, given to us in a useful fashion when and as we
3 asked for it. And we weren't always easy and consistent
4 in our requests, but we appreciate it very much. And I
5 think the last time I said that the firms ought to give
6 all of you a raise, and I think you've earned it. And we
7 thank you very much, the legal assistants, for their fine
8 work in enabling us to go forward.

9 We need to set a briefing schedule. You've got a
10 transcript on a daily basis, do you?

11 MR. HAMILTON: We do, Your Honor.

12 JUDGE PAYNE: So sometime next week you'll have
13 the -- you'll have the complete transcript.

14 MR. HAMILTON: I think sometime tomorrow we'll
15 have the complete transcript.

16 JUDGE PAYNE: Tomorrow. Okay.

17 MR. HAMILTON: We've been getting them every
18 night at about midnight.

19 JUDGE PAYNE: So when -- you have the first go.
20 You have the burden of proof. When do you want to file
21 yours?

22 MR. HAMILTON: Well, we -- first of all, two
23 questions. One, the last time I think we did this, we did
24 simultaneous opening briefs and simultaneous reply briefs.
25 And I would submit that that might be appropriate here.

1 JUDGE PAYNE: I think it led to some confusion
2 last time, some difficulty in figuring out where things
3 were and left the Court in sort of an unusual position.
4 Do you agree with that?

5 JUDGE KEENAN: That's fine.

6 I want to mention one thing, if I could, after you're
7 done.

8 JUDGE PAYNE: Yeah. Sure. Sure. On the
9 briefing?

10 JUDGE KEENAN: Yeah. About the content of the
11 briefing.

12 JUDGE PAYNE: Oh, yeah. So I think open,
13 response, reply.

14 MR. HAMILTON: Two weeks from Monday, perhaps,
15 would be appropriate time for an opening brief. And I'd
16 suggest two weeks after that for the -- for the opposition
17 and then maybe two weeks after that for the reply.

18 JUDGE PAYNE: That Monday is the 16th. So the
19 30th you would do your opening brief? Did you ask the
20 people who have to do this?

21 MR. HAMILTON: I'm sorry?

22 JUDGE PAYNE: Did you ask the people who have to
23 do this?

24 MR. HAMILTON: I actually did, and I have the
25 note to prove it.

1 JUDGE PAYNE: Two weeks from Monday is the 30th.
2 Is that what you meant?

3 MR. HAMILTON: Yes, Your Honor.

4 JUDGE PAYNE: All right. And then two weeks
5 from that is November 13th. Is that what you meant? Is
6 that what you all meant was two weeks or is that what you
7 want is two weeks and is the date correct?

8 MS. MCKNIGHT: Yes, Your Honor. That's fine.
9 So we understand plaintiffs will file an opening brief on
10 October 30th. Defendant-intervenors and defendants, if
11 they'd like, will file reply briefs on November 13th.

12 JUDGE PAYNE: And then response -- response
13 briefs. And then they get a right of reply. And,
14 Mr. Hamilton, when did you want to file that?

15 MR. HAMILTON: Maybe Wednesday, November 22nd
16 would be good. That's a little less than two weeks after
17 the opposition brief, but is --

18 JUDGE PAYNE: Thanksgiving is the 23rd. Does
19 that make a difference to your schedule?

20 MR. HAMILTON: To my schedule?

21 JUDGE PAYNE: Or who -- to those who are going
22 to carrying the laboring oar.

23 MR. HAMILTON: I'm kidding, Your Honor. No.
24 Wednesday the 22nd, I think, is --

25 JUDGE PAYNE: November 22nd.

1 MR. HAMILTON: And if we might, given the number
2 of different districts involved, I would ask leave to file
3 overlength briefs, maybe 40-page opening briefs and
4 25-page reply.

5 JUDGE PAYNE: Is that -- given the need to do as
6 the Supreme Court said, which is to consider it district
7 by district and the difficulty in doing that, I don't have
8 any problem with a brief of that length. Do you?
9 Anybody?

10 JUDGE KEENAN: That's fine.

11 JUDGE PAYNE: Does that suit you, 40 for their
12 opening, 40 for your response, 25 for their reply?

13 MS. MCKNIGHT: Yes, Your Honor. That's fine.

14 JUDGE PAYNE: All right. And I think Judge
15 Keenan has something she'd like to say about the content
16 of briefs.

17 JUDGE KEENAN: Yes. I'd like to ask the parties
18 to address the alternative prospect. This is not intended
19 to signal anything at all. But I just want to make sure
20 all the bases are covered; that if, for some reason, the
21 Court finds the plaintiff has met its proof burden as to
22 some but not all districts, what is the consequence for
23 the remedy? Is this regional in nature as well? For
24 example, if a burden of proof is found to have been met in
25 Richmond but not on the peninsula or in South Hampton

1 Roads, what does that do? If you'd consider the universe
2 of alternative possibilities rather than the primary
3 position that you're arguing, and include both of those
4 for our frame of reference, I think it would be helpful.

5 MR. HAMILTON: Yes, Your Honor.

6 JUDGE PAYNE: Do you have anything you'd like to
7 add to that?

8 JUDGE ALLEN: No.

9 MS. MCKNIGHT: Pardon me, Your Honor. Just --

10 JUDGE PAYNE: Yes, ma'am.

11 MR. RAILE: I -- just to be clear, Your Honor,
12 are you talking about the remedy if it's actually struck
13 down?

14 JUDGE KEENAN: Where is the Court left to go?

15 MR. RAILE: Because the burden sort of flips.
16 But you mean the ultimate they win on a district?

17 JUDGE KEENAN: No. What I'm saying is take --
18 we'll call the district by a number that is not in this
19 case. Let's say they win on District 10. What happens to
20 the other districts?

21 JUDGE PAYNE: If the only thing they win on is
22 District 10, what happens to the other?

23 JUDGE KEENAN: Right.

24 MR. RAILE: I understand. Thank you.

25 JUDGE PAYNE: If they win on more than those

1 two, what do they --

2 MS. MCKNIGHT: Thank you.

3 JUDGE PAYNE: I think -- is that right?

4 JUDGE KEENAN: Yes.

5 JUDGE PAYNE: Okay. All right. Again, thank
6 you very much. The case is submitted, and we'll proceed.
7 We'll let you know, after the briefing, whether we require
8 oral argument on the briefs. We'll be in adjournment.

9 (The trial concluded at 11:52 a.m.)

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P. E. Peterson, RPR Date _____